84-528

No. ——

Office-Supreme Court, U.S.
FILED
OCT 1 1984
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VIOLA LAPINSKI, HILDA HALL, and POLMYRA L. GOMES,
Petitioners,

v.

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, *et al.*,
Respondents.

ROBERT C. FERGUSON,
Petitioner,

v.

DISTRICT LODGE 160, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, AND ITS AFFILIATED LOCAL LODGE 1028, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT *and* APPENDICES

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QUESTION PRESENTED

Are employees unlawfully restrained in the exercise of their federal statutory right to refrain from concerted activity by an internal union rule, enforceable by court-collectible fines, which prohibits them from resigning from union membership and returning to work immediately preceding and during a strike?

PARTIES

In addition to the parties named in the caption, the National Labor Relations Board was a respondent in both consolidated cases in the United States Court of Appeals for the Ninth Circuit. The Board has informed this Court that it will file a separate petition for writ of certiorari. Memorandum for the NLRB at 3 n.3, *Pattern Makers v. NLRB,* No. 83-1894 (U.S. filed May 18, 1984).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Viola Lapinski, Hilda Hall, Polmyra L. Gomes, and Robert C. Ferguson, employee charging parties ("the employees") before the National Labor

Relations Board ("the Board"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit denying enforcement of the Board's orders against respondent labor organizations in two cases. As the cases involve the identical question and were consolidated by the court below, a single petition is submitted in accordance with Rule 19.4 of this Court.

OPINIONS BELOW

The opinion of the court of appeals from which review is sought appears in Appendix A to this petition and is reported as *Machinists Local 1327 v. NLRB,* 725 F.2d 1212 (9th Cir. 1984). The unreported order of the court of appeals denying rehearing en banc is set forth in Appendix D. The supplemental decision and order of the Board in *Machinists Local 1327* to which the court of appeals denied enforcement appears in Appendix C(2) and is reported at 263 N.L.R.B. 984 (1982). The decision and order of the Board in *District Lodge 160,* 265 N.L.R.B. No. 123, appears in Appendix C(3) and is reported unofficially at 112 L.R.R.M. 1012, 1982-83 NLRB Dec. ¶ 15,482 (1982).

In addition, the opinion of the court of appeals remanding *Machinists Local 1327* to the Board on an earlier appeal is annexed to this petition in Appendix B and is reported at 608 F.2d 1219 (9th Cir. 1979). The Board's decision and order denied enforcement on that appeal appears in Appendix C(1) and is reported at 231 N.L.R.B. 719 (1977).

JURISDICTION

The opinion and judgment of the court of appeals in the consolidated appeals was entered on February 14, 1984 (App. A, *infra,* pp. 2a-13a). The court granted the Board extensions of time until March 27, 1984, to file a petition for rehearing. A timely petition for rehearing en banc filed by the Board was denied in an order entered on July 10, 1984 (App. D, *infra,* pp. 96a-97a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982) and 29 U.S.C. § 160 (e)-(f) (1982).

STATUTORY PROVISIONS INVOLVED

These cases involve section 1(b) of the Labor Management Relations Act, 1947, 29 U.S.C. § 141(b) (1982), and sections 1, 7, and 8(a) and (b) of the National Labor Relations Act, 29 U.S.C. §§ 151, 157, 158(a)-(b) (1982). These sections are reprinted in pertinent part in Appendix E, *infra,* pp. 98a-103a.

STATEMENT OF THE CASE

These cases originated from charges brought by the petitioner employees before the Board against the respondent labor organizations, both of which are district and local lodges of the International Association of Machinists and Aerospace Workers.[1] Complaints were issued on behalf of the General Counsel of the Board, alleging that the union had violated section 8(b)(1)(A) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(b)(1)(A) (1982). App. C(1),

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[1] Respondent labor organizations and the international are collectively referred to in this petition as "the IAM" or "the union."

infra, p. 25a; App. C(3), *infra*, p. 86a. That section makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of employee rights guaranteed in section 7 of the Act, 29 U.S.C. § 157 (1982).

The specific violations charged were that the union had imposed court-collectible fines on the employees for returning to work, after submitting resignations from union membership, during strikes against their employers. The union defended on the ground that the employees had had prior notice that article L, section 3 of its constitution contained the following prohibition:

> The following actions or omissions shall constitute misconduct by a member . . . [:] Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout [if the resignation occurs during the period of the strike or lockout or] within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

App. C(1), *infra*, pp. 27a-29a; App. C(3), *infra*, pp. 88a-90a.[2] In due course, both cases were submitted to

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[2] The bracketed language inadvertently was omitted from all quotations of the provision in the record in *Machinists Local 1327*. It appears correctly in *District Lodge 160*.

the Board for determination upon stipulation. App. C(1), *infra*, p. 26a; App. C(3), *infra*, p. 87a.

The original decision and order in *Machinists Local 1327* was issued on August 29, 1977. The full Board, by a three to two vote, held that the union's constitutional provision was not a restriction upon the right of members to resign, but rather was an unlawful attempt to regulate post-resignation conduct of former members. Therefore, the fines imposed on employees Lapinski, Hall, and Gomes were found to be unfair labor practices. App. C(1), *infra*, pp. 25a-46a. The Board then petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its order. However, on October 10, 1979, a three-member panel of the Ninth Circuit (Kennedy, J., dissenting) denied enforcement on the ground that the IAM constitutional provision is a restriction upon resignation. The case was remanded to the Board for consideration of the validity of the provision as so construed. App. B, *infra*, pp. 15a-23a.

On September 10, 1982, the full Board issued a supplemental decision and order in *Machinists Local 1327*. By a four to one vote, the Board again concluded that the fines imposed upon the three employees were unlawful. App. C(2), *infra*, pp. 48a-84a. The Board majority was split. Members Fanning and Zimmerman held that the IAM restriction upon resignations was invalid because it prohibited all resignations during a strike. However, they would have sanctioned a rule requiring up to 30-days notice before a resignation becomes effective. *Id.*, pp. 48a-60a. Chairman Van de Water and Member Hunter concurred in the decision on the ground that "[a]ny union rule that restricts a

member's right to resign is unreasonable and any discipline taken by a union against an employee predicated upon such a rule violates Section 8(b)(1)(A)." *Id.*, pp. 61a-77a.[3]

Three months later, on December 16, 1982, a three-member panel of the Board found that *Machinists Local 1327* was controlling in *District Lodge 160*. The panel concluded that, under either plurality view in the earlier case, the union had violated section 8(b)(1)(A) of the Act by attempting to enforce its constitutional provision against employee Ferguson for returning to work after submitting his resignation from membership. App. C(3), *infra*, pp. 86a-94a.

Subsequently, the union petitioned for review in both cases, and the Board cross-applied for enforcement of its orders. Jurisdiction lay in the Ninth Circuit under 29 U.S.C. § 160(e)-(f) (1982). The employees intervened, and the cases were consolidated by the court of appeals.

On February 14, 1984, a three-judge panel of the Ninth Circuit denied enforcement to the Board's orders. The panel held that the Act allows unions to impose reasonable restrictions upon the right of employees to resign, and that the IAM's rule imposing fines on "strikebreakers" is such a reasonable restriction. App. A, *infra*, pp. 2a-13a. The Board's timely petition for rehearing and suggestion for rehearing

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[3] The reasoning of the concurring opinion in *Machinists Local 1327* has since been adopted by the majority of the Board in *Machinists Local 1414*, 270 N.L.R.B. No. 209, 1983-84 NLRB Dec. (CCH) ¶ 16,436 (June 22, 1984) (3-1 decision).

en banc was denied by the full court of appeals on July 10, 1984. App. D, *infra,* pp. 96a-97a.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Has Decided The Important Question Which This Court Left Open In *Granite State* And *Booster Lodge*, But In A Way Inconsistent With The Implications Of Those Decisions And Of *Scofield*

The importance of the question of federal labor law which these cases present is manifest: on three prior occasions the Court has granted certiorari to determine whether a union violates section 8(b)(1)(A) of the Act by imposing court-collectible fines upon employees for crossing a picket line to work for a struck employer.

In *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), the Court held that a voluntary, full union member lawfully could be fined for working during a strike in violation of a union rule against strike-breaking. *Allis-Chalmers* was a 5 to 4 decision in which the majority was provided by Justice White, who cautioned that the holding was narrow. *Id.* at 198-99 (White, J., concurring); *see NLRB v. Textile Workers Local 1029 (Granite State),* 409 U.S. 213, 215 (1972).

Justice White's caution proved to be warranted. In *Granite State* (8-1 decision) and *Machinists Booster Lodge 405 v. NLRB,* 412 U.S. 84 (1973) (per curiam), the Court agreed that a union commits an unfair labor practice where it fines employees who lawfully resign from membership before returning to work for a struck employer.

Granite State and *Booster Lodge* expressly left open the question of the validity under the Act of a union constitutional provision restricting the right of members to resign. *Booster Lodge,* 412 U.S. at 88; *Granite State,* 409 U.S. at 217. That is the question presented by these cases, as the Ninth Circuit recognized in both of its decisions. App. B, *infra,* p. 19a, *after remand,* App. A, *infra,* p. 3a & note 1. It is an issue which should be settled by this Court, since it is one that continually arises before the Board. *See, e.g., Typographical Union,* 270 N.L.R.B. No. 213, 1984-85 NLRB Dec. (CCH) ¶16,473 (June 25, 1984); *Machinists Local 1414,* 270 N.L.R.B. No. 209, 1983-84 NLRB Dec. (CCH) ¶16,436 (June 22, 1984); *Engineers Guild,* 268 N.L.R.B. No. 42, 1983 NLRB Dec. (CCH) ¶16,000 (Nov. 25, 1983); *Broadcast Employees (NABET) Local 531,* 265 N.L.R.B. No. 213, 1982-83 NLRB Dec. ¶15,490 (1982); *Carpenters San Diego County District Council,* 243 N.L.R.B. 147 (1979); *Auto Workers Local 1384,* 227 N.L.R.B. 1045 (1977).

Moreover, the court of appeals' holding, that the Act permits unions to enforce rules prohibiting resignations immediately preceding and during strikes, is in conflict with the principles established in prior decisions of this Court. In addition to *Allis-Chalmers, Granite State,* and *Booster Lodge,* the applicable precedents include *Scofield v. NLRB,* 394 U.S. 423 (1969), as the Ninth Circuit acknowledged. App. A, *infra,* p. 8a. However, the court of appeals ignored the reasoning of *Granite State* and *Booster Lodge* and misstated the fundamental holding of *Scofield.*

Section 7 of the act guarantees employees the right to refrain from joining unions and from participating

in concerted activities. *Granite State* and *Booster Lodge* held that this guarantee protects the dual rights of employees to resign from union membership and to return to work during a strike. *Booster Lodge,* 412 U.S. at 87-88; *Granite State,* 409 U.S. at 216. Indeed, the Ninth Circuit conceded as much, saying, "[w]e do not dispute the employee's § 7 right to resign from the union," although the court then eviscerated that right. App. A, *infra,* p. 11a. It follows that a union violates section 8(b)(1)(A) if it fines employees who resign from membership and return to work during a strike. *Booster Lodge,* 412 U.S. at 87-90; *Granite State,* 409 U.S. at 216-18.

Significantly, section 7 does *not* say that the right to refrain exists except as limited by union rules. The right "may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8](a)(3)." 29 U.S.C. § 157 (1982). But a compulsory-unionism agreement authorized by section 8(a)(3) can require only "financial core" membership—the payment of dues and fees—not *full* membership subject to union rules and discipline. *NLRB v. General Motors Corp.,* 373 U.S. 734, 742 (1963); *Service Employees Local 680 v. NLRB,* 601 F.2d 980, 981-82 (9th Cir. 1979); *see* 29 U.S.C. § 158(a)(3), (b)(2) (1982).

Nonetheless, the court of appeals reasoned that the right to resign may be restricted by a union because section 8(b)(1)(A) contains a *proviso* to the effect that it "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A) (1982). On its face, this pro-

viso merely permits a union to set the terms on which an individual may acquire and retain full membership, but it is *not* a grant of power to prevent an employee from leaving the union. *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 561-62 (1955). This is clear from the test established by this Court in *Scofield* for determining the lawfulness of attempts to enforce union rules:

> § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, *impairs no policy Congress has imbedded in the labor laws,* and is reasonably enforced against union members *who are free to leave the union and escape the rule.*

394 U.S. at 430 (emphasis added); *accord Granite State*, 409 U.S. at 216.

A union constitutional provision prohibiting resignations, either absolutely or (as here) for certain purposes, fails this test in at least two respects. First, it impairs the fundamental congressional policy imbedded in section 1 of the Act, 29 U.S.C. § 151 (1982), and in section 1(b) of the Labor Management Relations Act, 1947, 29 U.S.C. § 141(b) (1982), amending the Act,[4] of protecting the "full freedom of associa-

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[4] Section 1(b) of the Labor Management Relations (Taft-Hartley) Act is important here because the "right to refrain" language was added to section 7, and section 8(b)(1)(A) was enacted, in Taft-Hartley. Pub. L. No. 80-101, sec. 101, 61 Stat. 136, 140-41 (1947). The union argued below that the legislative history of Taft-Hartley shows that Congress intended to permit unions to prohibit resignations during strikes. On the contrary, although the legislative history is at best ambiguous as to whether Congress intended to permit unions to fine full members for strikebreaking,

tion" and "the rights of individual employees in their relations with labor organizations." The Court has viewed protection of employee freedom of association as *the* overriding purpose of the Act. In *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 280 (1956), the Court said that the two declared policies of the Act, to preserve a competitive business economy and to protect the rights of labor to organize, "depend for their foundation upon assurance of 'full freedom of association.' *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining 'the normal flow of commerce and . . . the full production of articles and commodities . . . .' "

The Ninth Circuit asserted that a "union's interest in making rules regarding the acquisition and retention of membership," because it is recognized in the proviso to section 8(b)(1)(A), is of equal dignity with and, therefore, cannot "impair" employee freedom of association. App. A, *infra,* pp. 10a-11a. This argument allows the proviso to swallow the more fundamental policy to which it is only an exception, the very practice that the *Scofield* test was designed to prevent. A rule which "puts some obstacles in the way of resignation," App. A, *infra,* p. 11a, by definition "invades," "frustrates," and "impairs." *Scofield,* 394 U.S. at 429-30, the right of employees to full freedom of association. Regardless of whether what an employee "endorsed" was membership or a strike, "the vitality of

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it does indicate that Congress meant to protect the right of employees to *resign* and return to work. *See Allis-Chalmers,* 388 U.S. at 200-02, 207-13 (Black, J., dissenting). The Ninth Circuit did not rely on legislative history for its decision.

§ 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." *Granite State,* 409 U.S. at 217-18.

Second, a provision prohibiting resignation from membership does not leave the employee "free to leave the union and escape the rule," as required by *Scofield,* 394 U.S. at 430. The Ninth Circuit disingenuously omitted this phrase from its statement of the test. App. A, *infra,* pp. 8a-9a. However, the "escape the rule" language is not mere surplusage, but a separate element of the test which must be met if a union rule is to be enforceable under the Act. *See Helton v. NLRB,* 656 F.2d 883, 893-96 (D.C. Cir. 1981); *NLRB v. Oil Workers Local 6-578,* 619 F.2d 708, 712-13 (8th Cir. 1980); *National Cash Register Co. v. NLRB,* 466 F.2d 945, 958-59 (6th Cir. 1972), *cert. denied sub nom. NCR Employees' Independent Union v. NLRB,* 410 U.S. 966 (1973). Indeed, in applying its test in *Scofield,* the Court explicitly stated that a union rule establishing production ceilings for members could be enforced lawfully through fines because, "[i]f a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, *then he may leave the union* and obtain whatever benefits in job advancement and extra pay may result from extra work * * *." 394 U.S. at 435 (emphasis added).

Instead of acknowledging that under *Scofield* union members must be "free to leave the union and escape the rule" which a union seeks to enforce, the court of appeals adopted the contrary proposition on the theory

that union members "may not betray their colleagues and expect to get away without paying a price for weakening the collective bargaining environment." App. A, *infra*, p. 11a. Thus, relying on "the presence of boilerplate provisions in a union's constitution," *Granite State*, 409 U.S. at 220 (Blackmun, J., dissenting), the lower court has resurrected the doctrine of "mutual reliance" and "union solidarity" which this Court rejected in *Granite State*, 409 U.S. at 217-18, *rev'g* 446 F.2d 369, 372-74 (1st Cir. 1971).

In short, although the Court did not decide this precise question in *Scofield*, *Granite State*, and *Booster Lodge*, the implicit teaching of those decisions is that the proviso to section 8(b)(1)(A) does not authorize the enforcement, through court-collectible fines, of a union constitutional provision abrogating the section 7 right of individual employees to resign from union membership and then refrain from participation in a strike. A writ of certiorari should be granted here to make it plain that the court of appeals erred in giving greater weight to union institutional needs than to the fundamental, express statutory rights of individual employees.

II. The Decision Below Is In Direct Conflict With The Decision Of The Seventh Circuit In *Pattern Makers* v. *NLRB*, 724 F.2d 57 (1983)

The Ninth Circuit pointed out that its decision in these cases is in direct conflict with that of the Seventh Circuit in *Pattern Makers v. NLRB*, 724 F.2d 57 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3875

(U.S. May 18, 1984) (No. 83-1894).[5] App. A, *infra*, p. 10a note 5. Law 13 of the constitution of the Pattern Makers' League provides that "'[n]o resignation or withdrawal * * * shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.'" 724 F.2d at 58. The Board, relying on its decision in *Machinists Local 1327*, had found that the League violated section 8(b)(1)(A) of the Act by fining employees who submitted resignations and returned to work during a strike. *Id.* at 58-59. The Seventh Circuit granted enforcement to the Board's order, holding that a union constitutional rule prohibiting its members from resigning during or immediately preceding a strike is invalid under the Act. *Id.* at 58.

In contrast to the Ninth Circuit, the Seventh Circuit recognized that "[a]lthough the unions in *Granite State* and *Booster Lodge* did not restrict resignations, the Court's reasoning applies equally" to a prohibition upon resignations during strike periods. Because such a union rule "completely suspends an employee's right

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[5] To the extent that the second decision of the Ninth Circuit viewed the IAM constitutional provision as a restriction on "post-resignation strikebreaking," App. A, *infra*, p. 9a, the decision squarely conflicts with *Granite State* and *Booster Lodge themselves*. "[W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street." *Granite State*, 409 U.S. at 217. *Cf. NLRB v. Machinists Merrit Graham Lodge 1871*, 575 F.2d 54 (2d Cir. 1978), *enforcing* 231 N.L.R.B. 727 (1977) (the provision of the IAM constitution at issue here is not a restriction upon resignation, and fines for resigning during a strike violated § 8(b)(1)(A)).

to choose not to be a union member and thus no longer subject to union discipline," the Seventh Circuit said, "it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities." Therefore, the court held, "[j]ust as the Union's power may not extend to an employee's post-resignation activities, it also may not extend to forbid an employee from resigning. * * * [A] union rule requiring retention of membership cannot be considered merely an 'internal matter' " which would be protected by the proviso to section 8(b)(1)(A). *Id.* at 60.

Also in contrast to the Ninth Circuit, in *Pattern Makers* the Seventh Circuit applied the *full* test established by the Court in *Scofield* for determining whether a union rule is lawfully enforceable through fines. The Seventh Circuit emphasized that "[t]he concept that union members were free to leave the union and escape the rule was central to the Court's analysis" in *Scofield*. "This fundamental principle is the embodiment of individuals' Section 7 rights and safeguards the balance between individual rights and the collective power of the union." Therefore, the court concluded, "[t]he principle applies to the circumstances presented in this case." *Id.* at 61.

The Pattern Makers' League, represented by the same lead counsel as the IAM in these cases, has petitioned this Court for a writ of certiorari in *Pattern Makers* on the ground that "[t]he decisions of the Seventh Circuit and the Ninth Circuit are in square conflict as to whether * * * union restrictions on resignations during a strike are invalid." Petition for a

Writ of Certiorari at 8, *Pattern Makers v. NLRB,* No. 83-1894 (U.S. filed May 18, 1984). Acknowledging this "direct conflict," the Board has informed the Court that it does not oppose the granting of certiorari in *Pattern Makers,* and that it intends to file a separate petition for writ of certiorari in these cases. Memorandum for the NLRB at 2-3 & n.3, *Pattern Makers v. NLRB,* No. 83-1894 (U.S. filed May 18, 1984).

The employees believe that the Court should review both *Pattern Makers* and these cases, and that it should consider them together. *Pattern Makers* and these cases are two variations on a common theme. The Pattern Makers' Law 13 prohibits any resignation during and immediately preceding a strike. The IAM's rule prohibits a resignation during the same period for the purpose of returning to work for an employee's struck employer, the most economically viable option for an individual faced with "the specter of hardship to his family." *Granite State,* 409 U.S. at 217. The Court should establish once and for all that neither restriction upon employee freedom of association is permitted by the Act.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted, and, if a writ is issued in No. 83-1894 as well, the cases should be set for argument consecutively or be consolidated and heard together.

Respectfully submitted,

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October 1, 1984

APPENDICES

APPENDIX A

Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACHINISTS LOCAL 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

VIOLA LAPINSKI, HILDA HALL, and POLMYRA GOMES,

Intervenors.

FILED
Feb 14 1984
Phillip B. Winberry
Clerk, U.S. Court
of Appeals

Nos. 82-7580 &
82-7701

DISTRICT LODGE 160, International Association of Machinists and Aerospace Workers, AFL-CIO, and AFFILIATED LOCAL LODGE 1028,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

ROBERT C. FERGUSON,

Intervenor.

Nos. 83-7052 &
83-7089

OPINION

On Petitions for Review
and Cross-Applications for Enforcement of an Order
of the National Labor Relations Board

Argued and submitted August 8, 1983

Before Tuttle* and Merrill, Senior Circuit Judges, and Pregerson, Circuit Judge.

Pregerson, Circuit Judge:

The question presented is whether a labor organization reasonably restricts the right to resign union membership when it imposes a fine under its constitution on a member who quits the union during a strike to resume working for the struck employer.[1] Because the restriction at issue comports with both national labor policy and the test set out in *Scofield v. NLRB*, 394 U.S. 423 (1969), we refuse to enforce the order of the National Labor Relations Board.

BACKGROUND

This case comes before us a second time. The parties do not dispute the facts, which we first outlined in *NLRB v. Machinists Local 1327 (Machinists I)*, 608 F.2d 1219 (9th Cir. 1979). The facts show that shortly before calling an economic strike against the employer, the union reminded

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* Honorable Elbert P. Tuttle, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1] This is the question the Supreme Court reserved in both *Booster Lodge 405 v. NLRB*, 412 U.S. 84, 88 (1973) (per curiam), and *NLRB v. Granite State Joint Board*, 409 U.S. 213, 217 (1972). These cases do not suggest that the Court would invalidate the rule in the present case, for neither *Booster Lodge* nor *Granite State* involved a union rule that expressly penalized a member for resigning union membership during a strike to resume working for the struck employer.

all members about the following rule in the union's constitution:

> *Improper Conduct of a Member*: . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement. . . .

Eight months after the strike began, three of the intervenor employees, Viola Lapinski, Hilda Hall, and Polmyra Gomes, submitted their resignations to the union, crossed the picket line, and returned to work. Later, the union imposed court-collectible fines on each employee for violating the rule. The employees responded by complaining that the union had violated National Labor Relations Act (NLRA) § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976),[2] and the Board issued a complaint. In a case tried on stipulated facts, the Board construed the provision as merely

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[2] Section 8(b)(1)(A) provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in [§ 7] of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

29 U.S.C. § 158(b)(1)(A) (1976). Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities . . . .

Id. § 157.

prohibiting certain post-resignation conduct, not as restricting the union member's right to resign. 231 N.L.R.B. 719, 720-21 (1977).

Considering that decision on the first appeal, we criticized the Board's construction of the provision as "hypertechnical." *Machinists I,* 608 F.2d at 1222. We concluded that the rule "defines or limits the circumstances under which a member may resign, and is a restriction on a member's right to resign," and asked the Board on remand to determine whether such a restriction was valid. *Id.*

On remand, a plurality of the Board decided that it should balance two competing interests: the employee's right to refrain from collective activity under NLRA § 7, 29 U.S.C. § 157 (1976), and the legitimate interest of a union in representing every employee in its bargaining unit. 263 N.L.R.B. 984, 985 (1982) (Fanning & Zimmerman, Members). After performing this operation, the plurality held that a union rule limiting a member's right to resign only to non-strike periods "constitutes an unreasonable restriction" on the right to resign. *Id.* at 986. The plurality went on to articulate a new rule permitting a union to prohibit a resignation "for a period not to exceed thirty days after the tender of such a resignation." *Id.* at 987.

But the two Board members who concurred in the result thought that *any* restriction on the employee's right to resign from the union is an unfair labor practice. *Id.* at 987-88 (Van de Water, Chairman & Hunter, Member, concurring). They filed a lengthy opinion disagreeing with the plurality's 30-day rule and virtually all of its reasoning.

A fifth Board member dissented altogether. He would have held that the rule was a reasonable restriction on the right to resign. *Id.* at 993 (Jenkins, Member, dissenting).

The union now petitions for review and the Board cross-applies for enforcement of its order.

STANDARD OF REVIEW

Ordinarily, we give "considerable deference" to the Board's expertise in construing and applying the labor laws. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 104 S. Ct. 439, 444 (1983); *see NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); *NLRB v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industries*, 704 F.2d 1164, 1166 (9th Cir. 1983).

But " 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 104 S. Ct. at 444 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

Therefore, although we should uphold the Board's reasonable and defensible constructions of the NLRA, we must not " 'rubber-stamp . . . administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying [the] statute.' " *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 104 S. Ct. at 444 (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)); *see Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

For the reasons that follow, we believe that the Board's holding, including its 30-day rule,[3] frustrates federal labor policy in important respects.

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[3] We question the wisdom of calling the 30-day standard a "rule." Only two members concur in it; the other three oppose it. Yet the concurring and dissenting opinions refer to the two-member plurality as a "majority," *see, e.g.*, 263 N.L.R.B. at 987 (Van de Water, Chairman & Hunter, Member, concurring); *id.* at 993 (Jenkins, Member, dissenting), and imply that the 30-day standard is now the law of the Board.

ANALYSIS

A. *National Labor Policy and Union Discipline*

Our national labor policy is built on the premise that employees can bargain most effectively for improvements in wages, hours, and working conditions by pooling their economic strength and acting through freely chosen labor organizations. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967).

Congress embraced this policy when it passed the Wagner Act in 1935 because the history of the labor movement demonstrated that employees who acted collectively were far more successful in improving their lot than those who faced employers individually. *See* A. Cox, D. Bok & R. Gorman, *Cases and Materials on Labor Law* 15-17 (8th ed. 1977). But to ensure that a union could not abuse its position as an exclusive bargaining representative, Congress also enacted the Taft-Hartley Act of 1947 and the Landrum-Griffith [*sic*] Act of 1959. These laws made unfair labor practices out of union conduct coercing employees in the exercise of their § 7 rights, *see* 29 U.S.C. § 158(b)(1)(A) (1976), and preventing union members from participating fully in union affairs, *see id.* § 411(a)(2). Moreover, the Supreme Court read the labor laws as requiring a union to represent every employee in its bargaining unit fairly and adequately. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944).

In imposing these substantial fiduciary obligations on labor organizations, however, neither Congress nor the Court gave individual members license to avoid union rules designed to protect the welfare of the bargaining unit.

Congress, therefore, enacted the proviso to § 8(b)(1)(A),[4] which reserves to unions the power to make reasonable rules regarding the retention and acquisition of mem-

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[4] *See supra* note 2.

bership. *Allis-Chalmers,* 388 U.S. at 181; 263 N.L.R.B. 984, 985 (1982) (plurality opinion). This power

> is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or to expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ." Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.

Allis-Chalmers, 388 U.S. at 181-82 (footnotes omitted) (quoting Summers, *Legal Limitations on Union Discipline,* 64 Harv. L. Rev. 1049, 1049 (1951)).

In short, federal labor policy restricts the individual employee's absolute power to order his relations with management. Instead, it vests this power in a collective representative who must protect the interests of everyone in the bargaining unit. As a result,

> [t]he complete satisfaction of all who are represented is hardly to be expected. A wide range of *reasonableness* must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Allis-Chalmers, 388 U.S. at 180 (emphasis added) (quoting *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953)).

B. *The Scofield Test and Post-Resignation Discipline*

In *Scofield v. NLRB,* 394 U.S. 423 (1969), the Supreme Court articulated a three-part test for determining when a union disciplinary rule is reasonable. A union is free to

enforce a properly adopted rule that (1) reflects a legitimate union interest, (2) impairs no policy that Congress has imbedded in the labor laws, and (3) is reasonably enforced against union members. *Id.* at 430. The Court elaborated part (2) of the test by holding that it could not enforce a rule that "invades or frustrates an *overriding* policy of the labor laws." *Id.* at 429 (emphasis added).

The Board, *see* 263 N.L.R.B. at 986, suggests that this is a balancing test. It is not. *Scofield* sets out an orderly three-step analysis for determining when the Board may approve and the courts of appeals may enforce a union rule. *Scofield* says that the rule cannot be enforced unless it first meets all three conditions. *Scofield* does not invite either the Board or the courts to conduct an ad hoc weighing of the allegedly competing interests described in the main text of § 8(b)(1)(A) on the one hand, and the proviso to § 8(b)(1)(A) on the other.

For reasons that we offer below, we hold that the rule in question meets all three parts of the test and does not impair any congressional labor policy.

1. *Legitimate union interest.* Unions exist to pool the resources of employees so that the employees can bargain most effectively for improvements in wages, hours, and working conditions. For at least two reasons, post-resignation strikebreaking presents "the most appealing case for allowing unions to restrain the activities of those who have resigned." Note, *Union Power to Discipline Members Who Resign,* 86 Harv. L. Rev. 1536, 1549 (1973) [hereinafter cited as Note, *Union Discipline*].

First, post-resignation strikebreaking is a serious threat to a union's viability. It can set off a chain reaction capable of destroying the collective bargaining environment. If a union cannot punish the few employees who fail to honor the results of a strike vote, then those employees can escape their obligations to their colleagues in the majority

simply by resigning and returning to work. If those members return to work and collect paychecks from the struck employer while the others remain on the picket line, some loyal union members will feel pressure to do the same. Eventually, a substantial number of defections could break the union and once again give the employer greater power to set the terms and conditions of employment. *See* Note, *Union Discipline, supra,* at 1549-51.

Second, members who participate in the strike vote and then fail to honor the result are breaching a promise to their colleagues. There is little point in taking a strike vote if the people who disagree with the outcome are free to resign anytime and escape its effects. "The strike vote itself involves mutual reliance on the promise to honor it." Note, *Union Discipline, supra,* at 1554; *see* 263 N.L.R.B. at 995 (Jenkins, Member, dissenting) ("In effect, the provision [for fining post-resignation strikebreakers] permits the Union to enforce its contract with each member—a contract which was freely entered into by all parties—and thereby protect its other members then exercising 'the ultimate weapon in labor's arsenal.' ") (citation omitted).

The problems that post-resignation strikebreaking poses, then, implicate the serious and legitimate interests of a union attempting to represent all its members.

2. *Impairment of labor policy.* The Board creates a false conflict between the employee's right to resign union membership and the union's interest in making rules regarding the acquisition and retention of membership.[5] These rights are preserved in § 7 and § 8(b)(1)(A) of the Act, respectively. Because *both* the employee's right and the union's

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[5] At least one Circuit, however, has agreed with the Board. *See Pattern Makers' League of North America v. NLRB,* No. 83-1045 (7th Cir. Dec. 21, 1983) (invalidating union rule fining members who resign to return to work for struck employer).

interest are policies that have been "embedded" in the labor laws for over 35 years, neither can "impair" or "override" the other within the meaning of *Scofield*. They must—and do—coexist.

Consequently, we look beyond the non-existent conflict to the particular facts of this case. The Machinists simply fine the union member who resigns to take a job with the struck employer. The union constitution, however, does not force a member to remain a member forever or even for the remainder of the strike. Our previous finding that the rule constitutes "a restriction on a member's right to resign," *Machinists I*, 608 F.2d at 1222, means only that the rule puts some obstacles in the way of resignation. We do not dispute the employee's § 7 right to resign from the union. But we disagree with the view that it is unreasonable for the union to penalize a member for breaching certain crucial obligations—here, the duty to refrain from strike-breaking.

Relying on language in *NLRB v. Granite State Joint Board*, 409 U.S. 213, 217-18 (1972), the Board argues that the Machinists' rule works unfair hardship on an employee who votes to strike, walks out, and entertains second thoughts months later when he is unable to pay the bills and feed the family. We share the Board's concern but reject its remedy. If union members believe that a strike should end, they have several options. They may work within the union to persuade their colleagues, and the leadership, to end the walkout. They may resign from the union and take a job with another employer. Ultimately, they may elect new leaders who share their views, or even petition the Board to decertify the bargaining representative. But they may not betray their colleagues and expect to get away without paying a price for weakening the collective bargaining environment.

3. *Reasonable enforcement.* The Board contends that the union's rule is too harsh because it restricts resignation for a period beginning two weeks before the strike starts through the duration of the strike. We believe this restriction is not only reasonable, but also critical. First, these periods represent times when presenting a solid front to the employer is most important. Even the appearance of uncertain membership support may encourage the employer to be recalcitrant during negotiations. Note, *Union Discipline, supra,* at 1553-54.

Second, once a member decides to resign from a labor organization, the union has no effective means of discouraging him from working for the struck employer unless it can threaten to collect a fine. To a member prepared to resign, of course, the threat of expulsion carries no weight. *Cf. Local 1255, International Association of Machinists & Aerospace Workers v. NLRB,* 456 F.2d 1214, 1217 (5th Cir. 1972) (union may condition readmission of expelled member on payment of fine for strikebreaking if such measure is the only way to collect the fine).

The Board argues, and we agree, that "the power of the union over the member is certainly no greater than the union-member contract." *Granite State,* 409 U.S. at 217. But the terms of the contract before us condition the member's right to resign on his promise not to break the strike. If the member can escape his obligation by pleading, when the union attempts to collect the fine, that he is no longer part of the union, then the terms of this contract mean little.

Because the union has no other practical means of enforcing its rule against a member's resigning and returning to work for the struck employer, we believe that collecting fines from members who break the rule is a reasonable means of enforcement.

CONCLUSION

For these reasons, we conclude that the union's rule fining strikebreakers is a reasonable restriction on the right to resign union membership.

Enforcement of the Board's order is DENIED.

APPENDIX B

Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit on the Prior Appeal

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115,

Respondent.

FILED
Oct 10, 1979
Richard H. Deane
Clerk, U.S. Court
of Appeals

No. 77-3723

OPINION

Petition to Review a Decision of the
National Labor Relations Board

Before: DUNIWAY and KENNEDY, Circuit Judges,
and BONSAL,* District Judge

DUNIWAY, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order against the respondent Union. The Board's Decision and Order are reported at 231 N.L.R.B. 719 (1977). We decline to enforce the Board's order, and remand to the Board for further proceedings.

The facts were stipulated, and the case went directly to the full Board. It held, by a 3 to 2 vote, that the Union had violated § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) by fining three of its members who, during a strike, had resigned, crossed a picket line, and gone back to work.

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* The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

The Board's condensed statement of the stipulated facts is as follows:

> Since approximately 1949 the Union has been the collective-bargaining representative of employees of Dalmo Victor, a division of Textron, Inc., ("the company"). About April 19, 1974, the Union called a meeting of its members and apprised them, including Company employees Hilda Hall, Viola Lapinski, and Polmyra Gomes, of an amendment to the Union's constitution that provided as follows (R. 21):
>
> > *Improper Conduct of a Member*: . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.
>
> On June 3, 1974, the Union called another meeting to take a strike vote and again told its members, including Hall, Lapinski, and Gomes, that under the provision anyone crossing the picket line might be fined. On that same day the Union commenced an economic strike against the Company and established a picket line. (R. 22.)
>
> Eight months later, on February 14, 1975, Hall and Lapinski submitted written resignations to the Union;

> they then returned to work, crossing the still-existing picket line on February 18. Gomes resigned from the Union on May 10, 1975; she then crossed the picket line [and returned to work] on May 12. On April 16, 1975, the Union fined Hall and Lapinski $2,277.50 each and on August 6, 1975 the Union fined Gomes $1,125 for working behind a picket line. (R. 22-23.) The fines are court-collectible (R. 30).

The strike was still continuing when the stipulation was executed on January 27, 1976.

In holding that the Union's constitutional provision did not justify the discipline, the Board found that the provision did not purport to restrict the members' right to resign from the Union, but rather sought only to unlawfully regulate post-resignation conduct. The dissenting Board members would have found the provision to be a restriction upon the right to resign, rather than a restriction upon post-resignation conduct. We think that the Board's holding is hypertechnical, and that the dissenting Board members state and apply the law more accurately.

We begin with the power of a union to discipline its members for crossing its lawful picket line or returning to work during a strike. A union rule against that conduct is a legitimate internal regulation of the conduct of its members, and imposition of a fine on a member is lawful under § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 1967, 388 U.S. 175, 195. *See also N.L.R.B. v. Granite State Joint Board, Textile Workers Union*, 1972, 409 U.S. 213, 215.

On the other hand, a union member has a right to resign from his union, protected by Section 7 of the Act, 29 U.S.C. § 157. *N.L.R.B. v. Martin A. Gleason, Inc.*, 2 Cir., 1976, 534 F.2d 466, 476. Moreover when the member does resign, "when there is a lawful dissolution of a union-member

relation, the union has no more control over the former member than it has over the man in the street." *Granite State, supra,* 409 U.S. at 217. To the same effect, see *Booster Lodge No. 405, Int'l Ass'n of Machinists v. N.L.R.B.,* 1973, 412 U.S. 84, 88. It is these two decisions upon which the Board majority placed its principal reliance.

However, in each case, the Court carefully restricted its holding. In *Granite State, supra,* Justice Douglas' opinion for the Court says:

> Neither the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign (409 U.S. at 214). . . .
>
> We have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union. (*Id.* at 216.)

Similarly, the Per Curiam opinion in *Booster Lodge, supra,* which simply followed *Granite State,* says:

> Neither its [the Union's] constitution nor its bylaws contained any provision expressly permitting or forbidding such resignation. (412 U.S. at 85-86) . . .
>
> [We] leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. (*Id.* at 88)

It was after the decision against it in *Booster Lodge, supra,* that the Machinists Union, in 1974, adopted the amendment to its constitution that is quoted in the stipulation of facts. The Union asserts that its purpose was to impose "contractual restrictions on a member's right to

resign," the validity of which was left open in *Booster Lodge*. The Board's position is that

> [T]he Union's constitutional provision is clear and unambiguous in its language, and that language places no clear restriction, no subtle restriction, no restriction by implication, and, in sum, no restriction whatsoever upon an employee's right to resign. Affirmatively, the provision seeks to do what its plain language says it seeks to do, that is, control, not resignations by members, but rather post-resignation conduct, i.e., the conduct of employees who are no longer members.

We cannot accept this hypertechnical reading of the Union's constitution. It plainly tells its members that resignation "shall not relieve a member from his obligation to refrain from accepting employment" at the struck establishment, or from his "obligation to observe the primary picket line" during the strike or the picketing, if the resignation occurs during that time or 14 days before. Surely that is a "restriction on a member's right to resign," *Booster Lodge, supra*, a "defining or limiting [of] the circumstances under which a member may resign," *Granite State, supra*. Apparently the Board majority would confine these phrases to provisions that expressly prohibit resignation at certain times or under certain circumstances. Such a provision would be a more drastic limitation on the member's right to resign, and thus less likely to be upheld, than the provision that is before us.

In short, we conclude that this case presents the question reserved by the Court in *Granite State* and *Booster Lodge*. We answer that question in part, by concluding that the provision before us defines or limits the circumstances under which a member may resign, and is a restriction on a member's right to resign.

The next question is whether the provision, construed as we construe it, is valid. Obviously, that question was not reached in *Granite State* or *Booster Lodge*. It was expressly reserved by the Board majority in this case (231 N.L.R.B. at 720). We should give the Board, the expert body in the field of labor relations, an opportunity to consider and decide the question. *See N.L.R.B. v. Food Store Employees Union*, 1974, 417 U.S. 1, 8-9; *Mohland v. N.L.R.B.*, 9 Cir., 1968, 394 F.2d 701, 704.

The petition for enforcement of the Board's order is denied. The case is remanded to the Board for further proceedings consistent with this opinion.

Re: NLRB v. Machinists, Local 1327, No. 77-3723

KENNEDY, Circuit Judge, dissenting:

I do not agree with the majority that the Board's decision is simply a hypertechnical construction that can be ignored. I believe there is great substance to the distinctions the Board makes, and I respectfully dissent.

The provision of the union constitution in question here seeks not to condition resignations by members, but rather to control the post-resignation conduct of employees who are no longer union members. I submit it is unlawful for a union to fine a former member for post-resignation conduct otherwise protected by § 7 of the Act. *Booster Lodge No. 405, Int'l. Ass'n of Machinists v. N.L.R.B.*, 412 U.S. 84, 88 (1973); *N.L.R.B. v. Granite State Joint Board, Textile Workers Union*, 409 U.S. 213, 215 (1972). The majority suggests that, because the Union's constitution specifically prohibits former members from returning to work following resignation during a strike, *Booster Lodge* and *Granite State* are not applicable. It concludes that the right of a labor organization to maintain solidarity during a strike and to prescribe its own rules with respect to the acquisition and retention of membership must take precedence over whatever section 7 rights its former members may have to abandon a lawful strike and return to work.

In holding that it would not imply limits on an employee's right to resign, the Supreme Court in *Granite State* and *Booster Lodge* reserved the question whether an explicit constitutional provision or bylaw specifically limiting the right to resign would be valid. These cases did not suggest, however, that restrictions on post resignation conduct, even if contained in explicit constitutional provisions, might be valid. Both *Booster Lodge* and *Granite State* hold that the disciplinary power of a union is restricted to those employees who are members of the union. Once that relation-

ship is dissolved, "the union has no more control over the former member than it has over the man on the street." *Granite State*, 409 U.S. at 217. When a member "lawfully resigns" from the union, "its power over him ends." *Id.* at 215. Once having resigned his membership, an employee again becomes fully protected by section 7 in refraining from participation in a strike, and the imposition of a court-collectible fine for working during a strike violates section 8(b)(1)(A). *Booster Lodge*, 412 U.S. at 87-88; *Scofield v. NLRB*, 394 U.S. 423 (1969). The Supreme Court thus has employed the concept of membership to delineate in sharp relief the bounds of union authority. There is no dispute in this case that the employees had submitted valid resignations, thereby terminating their union membership. Indeed, the Union stipulated that the charging parties did effectively resign as of the date it received their written resignations. This concession is all that is really necessary to reveal the lack of substance in the Union's position regarding the characterization of the constitutional provision. If the Union had placed direct and unambiguous restrictions on the right to resign, the case might be different, but it did not do so. The logic of *Booster Lodge* and *Granite State* thus compels the conclusion that the union cannot control the conduct of these former members.

If the provision of the union constitution here involved were truly a restriction on the right to resign, then I agree with the majority that we would face the issue expressly left open in *Granite State* and *Booster Lodge; see also Scofield v. N.L.R.B.*, 394 U.S. 423 (1969). That issue is not before us, however, since the union's constitution places no restriction on a member's right to resign. It attempts to control the post-resignation conduct of former members, and even the majority recognizes that a union's power does not extend so far.

The Union's right to enforce the fines it imposes on its members is a corollary of the member's rights not only to

reap the benefits of continuing union membership, but also to maintain a continuing voice in the union's course of action. *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, 388 U.S. 175, 191 (1967). No such justifications support the imposition of court-collectible fines on former members. I cannot agree that continuing membership to the extent, but only to the extent, that the "member" remains subject to union discipline is the equivalent of the "full union membership" relied upon by the Court in *Allis-Chalmers*, and relied on again in distinguishing that decision in *Granite State*. Thus, the distinction between membership or nonmembership is far more than a verbal nicety to be dismissed as lightly as the majority opinion does.

As the Board recognized in *Local Lodge No. 1994, Internat'l Ass'n of Machinists (O.K. Tool Co.)*, 215 N.L.R.B. 651, 653 (1974):

> Conformity may be none too high a price for the benefits of union membership. But the choice, at least in the absence of reasonable restrictions on resignation, is the individual's to make, not the union's. Should he choose to resign and forgo the benefits of union membership, the union may not nonetheless seek to exact conformity without regard to the individual's section 7 rights.

Whether or not the union might lawfully have placed reasonable restrictions on its members' rights to resign, it did not do so here, and so I find it unnecessary for the Board on remand to consider the validity of such hypothetical restrictions. I would hold that a court may not enforce union fines levied against a former member for exercising his section 7 rights following his lawful resignation.

/s/ Kathy M. Kennedy
United States Circuit Judge

APPENDIX C

Decisions and Orders of the National Labor Relations Board

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(1) Decision and Order in *Machinists Local 1327*, Entered August 29, 1977

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO, DISTRICT LODGE 115 (Dalmo Victor)

and Case 20—CB—3488

VIOLA LAPINSKI, an Individual

and Case 20—CB—3491

HILDA HALL, an Individual

and Case 20—CB—3629

POLMYRA GOMES, an Individual

DECISION AND ORDER

Upon charges duly filed by Viola Lapinski, Hilda Hall, and Polmyra Gomes, the Regional Director for Region 20 of the National Labor Relations Board, acting on behalf of the General Counsel of the Board, issued complaints alleging that the Respondent Union, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL—CIO, District Lodge 115, violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*).[1] The Respondent filed

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[1] Lapinski and Hall filed their charges in Cases 20—CB—3488 and 20—CB—3491 on May 7 and 12, 1975, respectively. On September 16, 1975, the Regional Director for Region 20 issued an order consolidating those cases, a consolidated complaint, and notice of hearing. Gomes filed her charge in Case 20—CB—3629 on September 11, 1975, and the Regional Director issued complaint and

answers to the complaints in which it admitted certain allegations of the complaints and denied others, including all those charging it with the commission of any unfair labor practices.[2]

On various dates in December 1975 and January 1976, the General Counsel, the Charging Parties, and the Respondent Union entered into a stipulation in which they agreed to certain facts relevant to the issues in this proceeding. They also agreed to waive a hearing before an Administrative Law Judge, the issuance of an Administrative Law Judge's Decision, and the presentation of any evidence other than that contained in the stipulation and the exhibits there referred to. By order dated February 20, 1976, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel and Respondent Union filed briefs with the Board.

The Board has considered the entire record in this case, including the parties' briefs, and makes the following:

Findings of Fact

I. The Business of the Employer

Dalmo Victor, the employer of the Charging Parties, has been at all times material a division of Textron, Inc., and has been a California corporation with a place of business

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notice of hearing in that case on October 10, 1975. Also on that date, the Regional Director issued an order consolidating the three cases and also a notice of consolidated hearing.

[2] The Respondent Union served its answers to the consolidated complaint in Cases 20—CB—3488 and 20—CB—3491 on September 22, 1975, and its answer to the complaint in Case 20—CB—3629 on October 14, 1975.

at Belmont, California, where it has been engaged in the manufacture of electronic products. During the past year, Dalmo Victor sold products valued in excess of $50.000 directly to customers located outside the State of California and purchased and received supplies at its California operations valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, we find, in agreement with the parties, that Dalmo Victor has been at all times material an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. The Labor Organization

The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Union has been the bargaining representative of employees of Dalmo Victor, herein called the Employer, since around 1949. At all times material Hall, Lapinski, and Gomes, the Charging Parties, have been employees of the Employer. On or about April 19, 1974, the Respondent called a meeting of its members, who at the time included the Charging Parties, and told them of the then newly adopted union constitutional provision which provided as follows:

> *Improper Conduct of a Member* . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of

> the strike or lockout within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

At all times since that meeting Hall, Lapinski, and Gomes have been aware of the constitutional provision. In early June 1974, the Union called a meeting to take a strike vote and at that time again told its members about the constitutional provision and warned them that anyone crossing the picket line would be fined. The employees, including the Charging Parties, began an economic strike against the Employer on June 3, 1974, which strike has continued to the present. The Union has throughout the strike picketed the Employer.

On February 14, 1975, Hall and Lapinski resigned membership in the Union, and the Union received notice of their resignation on February 19. The previous day the two had returned to work at the Employer's struck plant. On May 8, Gomes submitted her resignation; the Union received notice of the resignation on May 10; and Gomes returned to work on May 12. On April 16, 1975, the Union fined both Hall and Lapinski $2,277.50 each for working behind the picket line. Gomes was, for the same reason, fined $1,125 on August 6. The amount of the fines equaled the amount each employee had received as strike benefits while out on strike.[3] It is agreed that the fines are court collectible.

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[3] As noted above, Lapinski and Hall returned to work a day before the Respondent received any notification of their resignation. This fact is not relied on by any party for any reason whatsoever and the stipulation states that no part of these two employees' fines was for crossing the picket line prior to the Respondent's receipt of notice of their resignations.

The complaint alleges that the Respondent, by fining the former members for working behind the picket line, violated Section 8(b)(1)(A) of the Act. In support of this allegation the General Counsel relies primarily on the Board's decision in *O.K. Tool Company, Inc.*[4] There the union fined certain former members who had resigned during a strike, for doing struck work. The fines were alleged to be unlawful. The union defended its conduct on the ground that under the terms of its applicable constitutional provision—the same one involved in this proceeding and quoted above—the fining of the "strikebreakers" was proper. A majority of the Board held, however, that not only did the "proscription of postresignation strikebreaking impair a former member's Section 7 right to refrain from concerted activity, but it also is plainly contrary to *Scofield's* requirement that union members be free to leave the union to escape membership conditions that they consider onerous."[5] It, thus, concluded that the union could not legally "levy court-collectible fines against a former member for exercising his Section 7 rights following lawful resignation from the union."[6]

There is no substantial or relevant distinction between the situation that faced the Board in *O.K. Tool* and that

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[4] *Local Lodge No. 1994, International Association of Machinists and Aerospace Workers, AFL—CIO (O.K. Tool Company, Inc.)*, 215 NLRB 651 (1974).

[5] 215 NLRB at 653. The reference is to the Supreme Court's decision in *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969).

[6] 215 NLRB at 653. The Board also found in that case that the union unlawfully threatened to fine former members for postresignation "strikebreaking," as well as unlawfully fining them for such conduct. There is no allegation of unlawful threats in the present case.

which is now before us.[7] Nor has the Respondent raised in this proceeding any argument or other consideration showing that the Board's decision in that case was wrong or otherwise inadvisable. Consequently, we find for the reasons set forth in the majority decision in *O.K. Tool* that the Respondent by fining former members Lapinski, Hall and Gomes for their postresignation "strikebreaking" violated Section 8(b)(1)(A) of the Act.

Our dissenting colleagues disagree with our result here essentially on the ground that they would find that the Union's constitutional provision forbidding postresignation "strikebreaking" was actually a restriction on the employees' right to resign from the Union. From this Member Jenkins concludes that such restriction should be held proper—and thus the fines at issue in this case lawful—as "measures . . . within the ambit of the Union's control over its internal affairs" and both he and Member Murphy view the restriction as a means of protecting the strike as a legitimate economic weapon. If indeed the constitutional provision here involved and quoted above were truly a restriction on the right to resign, then, as the dissenters in effect claim, we would be faced with an issue the Supreme

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[7] The Respondent points to the fact that in *O.K. Tool*, unlike in the present case, the union had misstated to the fined employees the meaning of the "Improper Conduct of Member" constitutional provision and claims that this is a factual difference warranting a different result in this case. The rationale of the concurring opinion in *O.K. Tool* did rest in part on the fact of misrepresentation. However, the majority decision did not turn at all on that fact but treated it as irrelevant by ignoring it. As precisely set forth, the issue decided by the majority in *O.K. Tool*—and it is the same issue as that before us now—was "whether or not a labor organization may lawfully . . . impose . . . a court-collectible fine on a former member, who has tendered a valid resignation, for conduct following his resignation which is prohibited by the union's constitution but protected by Section 7 of the Act." 215 NLRB 651, 652.

Court expressly left open in its *Scofield* and *Granite State* decisions,[8] and thus with determining if such a restriction as enforced here with fines is lawful. But that issue is not before us, and we express no opinion on it. For the Union's constitutional provision is clear and unambiguous in its language, and that language places no clear restriction, no subtle restriction, no restriction by implication, and, in sum, no restriction whatsoever upon an employee's right to resign. Affirmatively, the provision seeks to do what its plain language says it seeks to do, that is, control, not resignations by members, but rather postresignation conduct, i.e., the conduct of employees who are no longer members.[9] Consequently, as we have found above, the Union's fining the Charging Parties for crossing the picket

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[8] *Scofield* v. *N.L.R.B., supra; N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL—CIO [International Paper Box Machine Co.]*, 409 U.S. 213 (1972). In the latter case the Court in finding fines on former members unlawful cautioned that it was not deciding "to what extent the contractual relationship between union and member may curtail the freedom to resign." 409 U.S. at 217.

[9] Our construction here not only is required by a plain reading of the language involved but also is wholly consistent with the actual position taken by the Union in stipulating that the Charging Parties did indeed resign as of the date it received their written resignations. Member Jenkins' discussion seeking to avoid the implications of this stipulated fact initially concedes, as it must, that the employees did effectively resign on such date. This concession is all that is necessary to reveal the unsubstantiality of his position. As for his other observations concerning the stipulated resignations, they are, even if true, largely irrelevant but seem to us to be little more than an involved rationalization intended to resolve the discrepancy between his theory of the case and the actual facts. Finally, we might add that, if the Union had intended to place restrictions on the right to resign, it could have done so directly and unambiguously, but this it has not done.

line was, as we held in identical circumstances in *O.K. Tool*,[10] unlawful under the Supreme Court's decision in *Scofield* and *Granite State*. The contrary result championed by our dissenting colleagues is based on an obvious miscontruction of the matters here before us.[11]

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[10] Member Jenkins states in effect that in *O.K. Tool* the majority failed to realize that the Supreme Court decisions on which they relied (*Scofield* and *Granite State*, both cited *supra*) involved contexts "in which the union had placed no restrictions on the right of a member to resign" and seems to imply that if they had realized this the majority would have reached a different result there. We fail to see how he could conceivably have come up with any such idea. Even a most casual reading of the *O.K. Tool* decision shows that the majority considered the constitutional provision in dispute to be a restriction on postresignation conduct, not a restriction on resignation itself. Consequently, the *O.K. Tool* "context" was the same as the "context" in the cited Supreme Court cases. Thus, even if the *O.K. Tool* majority did not realize, as Member Jenkins claims, that those Supreme Court cases involved contexts with no restrictions on the right to resign, we fail to see what difference it would have made to the majority's resolution of the issues before them. Of course, the majority was well aware that neither their decision nor the Supreme Court decisions were concerned with the issue of restrictions on resignation, for they stated that such an issue was "not raised by the facts of this proceeding." 215 NLRB at 653.

[11] Member Jenkins' position might also be construed as a claim that the fines are legitimate because the Union's constitutional provision provides for resignation subject to automatic revocation in the event a former member breaches his obligation not to cross a picket line—a rather novel concept—or provides only for limited resignation, i.e., resignation for all purposes other than noncompliance with the no-strikebreaking clause. Both of these rather unrealistic constructions come down to much the same thing and would in substance represent, if correct, an attempt by the Union to extend an obligation of membership to employees who, in view of their contingent or partial resignations, no longer have any of the rights and privileges of membership. See *O.K. Tool Co.*, 215

The dissenters treat the notice and consent required for enforcement of the union-member contract[12] as no more than an annoying technicality. Otherwise they could not seriously argue that the reasoning necessary to equate the Respondent's restrictions on postresignation activity with restrictions on resignation is consistent with reasonable notice that members may not resign during a strike. The same provision was described to the Supreme Court in *Boeing* as explicitly binding "a member, notwithstanding his resignation, to abstain from strikebreaking for the duration of an existing strike."[13]

There is a distinction between postresignation restrictions and restrictions on resignation, implicitly acknowledged, if not identified, by the dissenters. A member has the right to participate in his union's affairs, but surrenders that right on resignation. The dissenters suggest nothing which would show that the Respondent continued to allow a former member to participate in its affairs "notwithstanding his resignation." The absence of that right and membership benefits was decisive in *O.K. Tool.*

Contrary to Member Murphy, we see no reason to believe that the Textile Workers interests in *Granite State* were

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NLRB at 653. Thus, the fines for crossing the picket line would under those theories find no sanction in the Supreme Court's decision in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196 (1967), and would be in conflict with the Court's statement in *Scofield, supra* at 430, to the effect that fines are lawful only against members "who are free to leave the union and escape the rule" the breach of which would result in a fine.

[12] See *N.L.R.B.* v. *Granite State Joint Board, supra* at 217, fn. 5; *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers, AFL—CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84, 88 (1973).

[13] 412 U.S. at 89, fn. 9.

any less legitimate than are those of the Machinists here or in *Boeing*, yet the attempts to enforce those interests were found unlawful by both the Board and the courts. The issue is not now, and has never been, whether unions have legitimate interests in restricting resignations or postresignation activity. They do. But those interests are not absolute. The issue is whether unions' attempts to protect those interests impermissibly intrude on other matters of concern under the national labor policy.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, occurring in connection with the Employer's operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in, and is engaging in, certain unfair labor practices, we shall order it to cease and desist therefrom. In order to effectuate the purposes of the Act, we shall also order the Respondent to rescind the unlawful fines, to refund any money paid to it as a result of the fines, with interest computed at 7 percent per annum,[14] and to post the notice attached as an appendix to this Decision and Order.

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[14] In accordance with our decision in *Florida Steel Corporation*, 231 NLRB No. 117 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

Conclusions of Law

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing court-collectible fines on former members who had duly resigned from the Union, for their post-resignation crossing of a sanctioned picket line and working during a strike at Dalmo Victor, Respondent restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL—CIO, District Lodge 115, Burlingame, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees who have resigned from, and are no longer members of, Respondent in the exercise of the rights guaranteed them in Section 7 of the Act by imposing court-collectible fines on such employees because of their postresignation conduct in working at Dalmo Victor during the strike which began on June 3, 1974.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the fines levied against Viola Lapinski, Hilda Hall, and Polmyra Gomes because of their postresignation work for Dalmo Victor during the strike which begain [*sic*] in June 1974, and refund to them any money they may have paid as a result of such fines, plus interest.

(b) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized representative of Respondent, shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 20 signed copies of said notice for posting by Dalmo Victor, if the Company is willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, after being duly signed

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by the Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. August 29, 1977

John H. Fanning, Chairman

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER JENKINS, dissenting:

The majority accepts the fact that the Union had a validly adopted constitutional provision which defines "Improper Conduct of Member" as including the failure of a member to observe a picket line for its duration, notwithstanding his resignation, when the picket line was established prior thereto. The majority also accepts the facts that the Union brought this provision to the attention of its members, including the Charging Parties, before the membership voted to strike, and that the Charging Parties were aware of this provision before the strike was called. In addition, the majority does not contest the Union's claims that this provision was properly adopted and reasonably enforced against the Charging Parties. The majority likewise acknowledges that the amount of the fines assessed were equal to the amount each employee had received as strike benefits while out on strike.

Despite these acknowledgments, the majority finds the Union's actions in fining the Charging Parties pursuant to the above-stated constitutional provision to be violative of Section 8(b)(1)(A) of the Act, on the strength of the Board's decision in *O.K. Tool Company, Inc., supra.* While I concurred in the similar result reached in that case based solely on the substantially different set of facts involved here, I specifically refrained from taking any position on the broader legal issue of whether or not a union may, on proper notice and in the absence of any other legal impediment, enforce an otherwise valid constitutional provision forbidding former members from returning to work following lawful resignation from the Union. That legal issue has been squarely presented here by a stipulated record which effectively eliminates any other possible misconduct on the part of the Union in terms of the manner in which the constitutional provision was adopted or implemented, or in terms of the actual notice given to the Charging Parties.

Contrary to the majority both here and in *O.K. Tool*, I would conclude that the Union was entitled to levy these fines as a means of enforcing a lawful rule, as such measures are within the ambit of the Union's control over its internal affairs.

My principal disagreement with the majority is based on the *O.K. Tool* majority's too narrow reading of Supreme Court precedent in this area. The Court in *Scofield, supra*, stated that it had taken and would continue to take a dual approach to the problem of evaluating the validity of union fines *vis-a-vis* Section 8(b)(1)(A) of the Act, such that properly adopted union rules, reflecting legitimate union interests, which impair no policy Congress had imbedded in the labor laws, and which are reasonably enforced against members, are permissible under that section, whereas fines against exmembers would be violations. That statement reflects the Court's view that union rules and their enforcement are an internal matter governed by contractual considerations as embodied in the union's constitution and bylaws, which are agreed to by the members in consideration for the benefits attained by membership. In support of this view, the Court has noted that union security can not compel such membership. It is also important to note, however, that in expressing this view, the Court was speaking in a context in which the union had placed no restrictions on the right of a member to resign.[16]

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[16] I agree with the majority that a most casual reading of the *O.K. Tool* majority decision might lead one to conclude that inasmuch as it was found there that the factual "context" did not involve a restriction on the right of a union member to resign, the union's conduct was unlawful under prior Supreme Court precedent. However, a close reading of that decision, as well as the facts of that case—admittedly identical to the facts here relative to the constitutional provision under scrutiny—reveals the fallacy of concluding that the provision is anything other than a restric-

While the significance of that context was apparently lost on the *O.K. Tool* majority, the Supreme Court itself acknowledged its importance in *Granite State*,[17] decided after *Scofield*, when as part of its decision finding the union's action in fining resigned members violative of Section 8(b)(1)(A), it disclaimed any consideration of the problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union, since no such provision was involved in either that case or in *Scofield*. Thus, the *O.K. Tool* majority, while citing the language in *Granite State* by which the Court set forth its rationale for finding the union's conduct violative of the Act, ignored the fact that in saying that a member must be "free to refrain in November from the action he endorsed in May" the Court specifically limited this principle by the possibility that a union may restrict this freedom by an express constitutional limitation, properly adopted, duly instituted, and reasonably applied. The Supreme Court never had such a factual context before it, even though the union in *Granite State* argued that such a restriction could be implied from its membership's participating in the strike vote and ratification of a poststrike rule against aiding and abetting the employer during the strike.

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tion on the right of a member to resign during an ongoing strike. Whether or not the majorities here and in *O.K. Tool* would have reached a different result if they had interpreted the provision as I do is something I can only speculate about since neither has spoken to the question left open by the Supreme Court, but instead have chosen to construe the facts in such a way as to obviate it.

[17] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL—CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972).

Similarly, the Supreme Court rejected the union's contention in a later case[18] that a general constitutional proscription against strikebreaking would suffice as an implied restriction on the right of a member to resign during a strike in order to avoid the rule against strikebreaking. Contrary to the implication of the majority, the 1973 decision of the Court in *Boeing* did not consider the validity of the provision here invoked by the Union, inasmuch as the Union's constitution was amended in 1974 to add the explicit language relied on here.

The Court in *Granite State* as well as in *Boeing* rejected the union's contentions since its concern with the right of a member to resign and escape the effect of union rules was too strong to permit the waiver of this right by implication. Nevertheless, the Court did leave open the question of the possible validity of a conscious waiver as embodied in a reasonable constitutional provision limiting this right, to be decided when and if a union adopted such a provision. The Court chose not to decide this issue absent a factual context, presumably so that the adoption and implementation, as well as the substantive validity of such a limitation could be examined together. Indeed, it was these surrounding circumstances in *O.K. Tool* which led me to concur in the result reached there without commenting on the substantive issue, even while recognizing that the provision, under proper circumstances, did raise the legal issue. The majority in *O.K. Tool*, however, simply read the provision before it as not limiting resignations, but only postresignation strikebreaking, thus sidestepping the legal issue left open by the Court. In so doing, it gave no justification for this interpretation except to point out that the respondent union had "conceded" that the fined

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[18] *Booster Lodge 405, International Association of Machinists & Aerospace Workers, AFL—CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973).

employees had duly resigned before crossing the picket line.

The conclusion is therefore inescapable that, contrary to the almost exclusive reliance the *O.K. Tool* majority placed on *Granite State* and *Boeing* in deciding the issue before us, prior Court decisions do not decide the question posed by the constitutional provision here and in *O.K. Tool*. Moreover, the very fact that the Court was careful to point out that the precise legal question here was not presented by the facts in *Granite State* or in *Boeing* is clear evidence that the Court felt that neither its decisions in those cases nor its prior analysis of the general area in *Scofield* was determinative of the instant problem.

In light of the above, and inasmuch as it has been admitted that the fines were levied pursuant to the Union's constitutional provision, it becomes necessary to determine whether or not the language of that provision is in reality a restriction on a member's right to resign or, as the majority concludes, an attempt to exercise control over exmembers.

One attempt the majority makes to justify its construction of the provision is that its construction is consistent with the "actual" position taken by the Union in stipulating that the Charging Parties did resign as of the date it received their written resignations. This apparently is in reference to the Union's admitting to those allegations in the complaint concerning the tendering of resignations. While it is unquestionably correct that the resignations were stipulated as having occurred when they did and that the stipulation may be consistent with the majority's construction, such facts are in no way inconsistent with, nor do they undermine in any way, the Union's contention that these resignations were subject to the restrictions contained in the constitution. There is no reasonable action the Union could have taken, at the time these resignations were tendered, to reaffirm the binding nature of its con-

stitutional provision conditioning these resignations on the members' prior commitment to honor the strike already begun for its duration. A failure to accept these resignations, at a time before these individuals had crossed the picket line, would have constituted a refusal by the Union to abide by its own constitution and the shoe would be on the other foot. However, the Union lived up to its contract with its members and accepted these resignations pursuant to its constitution, while the Charging Parties' subsequent crossing of the picket line was a breach of their prior commitment which imposed the condition that their resignations did not confer the right to cross the picket line.

The majority also contends that the language of the provision places no restriction on the right to resign. This contention is incomprehensible in light of the explicit language of that provision stating that "resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period [in question]." While there is no evidence as to what the Charging Parties understood by this, the majority does not explain in what respects the above language is either ambiguous or unclear. Although my colleagues could perhaps suggest language that would be more emphatic or more direct, I cannot accept a contention that the words chosen by the Union are unintelligible or unclear, and there is no contention that these words were not fully understood by all concerned. What is clear is the foundation of the majority's position, that because the Union failed to use some favored form of language (what this language might be is not revealed), this case is outside the realm of the potentially valid action suggested by the Supreme Court.

Finally, the majority attempts to bolster its construction by labeling the result of the construction I would give the provision as constituting either contingent or partial resignation. While I agree that such characterizations might

well apply, I fail to see how or why they would be "unrealistic" as the majority says, inasmuch as the result reached, no matter how you label it, is precisely what was intended by the Union and accepted by the members; and it is a result which the Supreme Court inferentially found to be potentially valid. Moreover, to say, as the majority does, that the effect of such a construction would be to limit somewhat the freedom of a member to leave the union to escape the rule is to ignore the fact that the Court in stating this principle specifically left open the possibility that some limitation might be possible if it was implemented properly within the contractual relationship between union and member. *Granite State,* 409 U.S. at 217.

There are no facts here from which it can be concluded that the Charging Parties were not fully aware of the restrictions placed upon them by the language in question, and the majority admittedly has offered no reasons why the restrictions here should not be dealt with by the Board as would any other internal union matter. Obviously some restriction of rights is involved, but when the employees freely, knowingly, and expressly agree to such limitations in order to attain the additional strength such a prior commitment gives to the strike as an economic weapon, I can perceive no reason in Board law, Supreme Court precedent, or overall labor policy to declare such a prior commitment a nullity. Rather it seems to me to be a flagrant exercise in semantic double-think to hold, as the majority does, that the words "resignation shall not relieve a member of his obligation [to honor a strike]" are not a restriction on the right to resign. What magic words would the majority have a union utilize before it will acknowledge the existence of this issue, about which it here refuses to express any opinion?

In sum, as I view the Supreme Court decisions herein as not having foreclosed the possible validity of union restrictions on postresignation strikebreaking, and since the issue

here has been limited by stipulation to what amounts to a purely legal question, I would conclude on that basis that the restriction here is not contrary to Board law, excepting *O.K. Tool* as here construed, or to the policies of the Act, and would therefore find, contrary to my colleagues in the majority, that the Union's actions were not violative of Section 8(b)(1)(A). To whatever extent *O.K. Tool* is inconsistent, I would overrule it.

The intent of the provision, as a means by which unions protect the strike as a legitimate economic weapon, has been consistently accepted as valid by this Board as well as the Supreme Court. The amounts of the fines were limited to the actual amounts of money received by the individuals from the Union when they were supporting the strike and were therefore neither excessive nor punitive.

Although the majority has seen fit to suggest that underlying the technical approach it takes throughout most of its decision there lies a question of balancing legitimate interests, it nevertheless steadfastly adheres to its basic rationale that the Union's constitution does not place any restrictions on a member's right to resign, thus essentially foreclosing any real discussion of the broader legal issue involved. If indeed the issue here is, as the majority suggests (and I agree), "Whether [the Union's] attempts to protect [its] interests impermissibly intrude on other matters of concern under the national labor policy," why is it that its holding is predicated on the conclusion that this issue is "not before us, and we express no opinion on it." The majority cannot have it both ways. Either they must recognize the fact that this case presents the essential legal and policy issue, or leave it open for decision in a later case. Accordingly, I would dismiss the complaint in its entirety.

Dated, Washington, D.C. August 29, 1977

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

MEMBER MURPHY, dissenting:

I cannot agree with the conclusion that the Respondent acted unlawfully in imposing fines under the facts of this case. I believe a union member has a right under Section 7 of the Act to resign membership from his or her union at any time, subject to such reasonable restrictions as the union through its constitution and bylaws may have duly placed on resignations and timely brought to the member's attention. The relevant Supreme Court decisions certainly do not preclude this conclusion, even if they do not expressly endorse it. See, e.g., *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969); *N.L.R.B.* v. *Granite State Joint Board etc.*, 409 U.S. 213 (1972).

Here I find that a realistic construction of the interrelated provisions of Respondent's constitution clearly show that it contained such a reasonable and valid restriction on resignation. Thus, the restrictions on working behind a picket line during a strike are in any practical sense an obvious restriction on the right of members to resign from the Union just before or during a strike for the purpose of working at their employer's struck plant. Furthermore, I believe that such a restriction on the right to resign under the facts here is directed toward protecting a legitimate union interest and is, thus, reasonable and lawful. Consequently, in the circumstances before us, where the employees were given full and timely notice of the prior existence of a reasonable restriction on their right to resign, I would find, contrary to the majority, that Respondent in finding [*sic*] the Charging Parties for working behind the picket line did not, as alleged, violate the Act. I would, therefore, dismiss the complaint.

Dated, Washington, D.C. August 29, 1977

Betty Southard Murphy, Member
NATIONAL LABOR RELATIONS BOARD

[Appendix omitted]

APPENDIX C

Decisions and Orders of the National Labor Relations Board

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(2) Supplemental Decision and Order in *Machinists Local 1327*, Entered September 10, 1982

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO, DISTRICT LODGE 115 (Dalmo Victor)	
and	
VIOLA LAPINSKI, an Individual	Case 20—CB—3488
HILDA HALL, an Individual	Case 20—CB—3491
POLMYRA GOMES, an Individual	Case 20—CB—3629

SUPPLEMENTAL DECISION AND ORDER

On August 29, 1977, the Board issued a Decision and Order in this proceeding[1] in which it found that a constitutional provision adopted by Respondent, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL—CIO, District Lodge 115, did not constitute a restriction on a member's right to resign from Respondent but rather constituted an unlawful attempt by Respondent to restrict the post-resignation conduct of former members.[2] Accordingly, the Board con-

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[1] 231 NLRB 719.

[2] The constitutional provision provided as follows:
Improper Conduct of a Member . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days pre-

cluded that Respondent had violated Section 8(b)(1)(A) of the Act by imposing fines on the Charging Parties, Viola Lapinski, Hilda Hall, and Polmyra Gomes, for resigning their membership in Respondent and returning to work during the course of a strike. It then ordered Respondent to rescind the fines levied against Lapinski, Hall, and Gomes and to refund to them, with interest, any moneys they may have paid as a result of the unlawfully imposed fines. Thereafter, Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the Ninth Circuit and the Board filed a cross-petition for enforcement of its Order.

On October 10, 1979, the court issued its opinion in this case[3] denying enforcement of the Board's Order on the ground that Respondent's constitutional provision was, contrary to the Board's finding, a restriction on a member's right to resign and not an unlawful attempt to restrict a former member's post-resignation conduct. However, noting that the Board had not had the opportunity to determine whether the provision, as construed by the court, was valid, the case was remanded by the court to the Board for further proceedings consistent with its opinion.[4]

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ceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

[3] 608 F.2d 1219.

[4] We have accepted the remand from the Court of Appeals for the purpose of determining the validity of art. L., sec. III, as a restriction on resignation. We accept the court's determination that this provision is a restriction on resignation only as the law of the case. We otherwise adhere to our earlier determination that this clause constitutes a restriction on post-resignation conduct.

On December 12, 1979, the Board, having determined that this and another case,[5] involving the right of a labor organization to impose restrictions on a member's right to resign, presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument for January 16, 1980. Thereafter, on January 16, 1980, Respondent, the General Counsel, the Charging Parties, and the American Federation of Labor and Congress of Industrial Organizations[6] presented their oral argument before the Board.

The Board, having duly considered the entire record in this case and the oral arguments presented to it, finds as follows:

Pursuant to the court's remand, we are here asked to decide whether a union can, pursuant to an internal rule prohibiting resignations during a strike or within 14 days preceding its commencement, lawfully impose a fine on members who tendered resignations and returned to work during the course of a strike in apparent violation of the union rule prohibiting such resignations. Respondent asserts that, under the proviso to Section 8(b)(1)(A) of the Act,[7] its constitutional provision is valid and enforceable

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[5] *Pattern Makers' League of North America, AFL—CIO, and its Rockford and Beloit Associations (Rockford-Beloit Pattern Jobbers Association)*, Case 33—CB—1132.

[6] The American Federation of Labor and Congress of Industrial Organizations appeared as *amicus curiae* and argued orally on behalf of the Respondent's position.

[7] Sec. 8(b)(1)(A) of the Act provides that it "shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, that This paragraph shall not impair the right of a labor organization to prescribe its own rules

and that, consequently, the fines imposed thereunder are lawful. The Charging Parties, on the other hand, contend that the restriction in question unreasonably interferes with their Section 7 rights and that the attempt to impose and collect fines under such a provision violates Section 8 (b)(1)(A) of the Act. We agree with the Charging Parties' contention.

Initially, we note that in *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), the Supreme Court held that a union may, without violating the Act, impose fines on persons who, while retaining full membership rights in the union, cross an authorized picket line and return to work during a strike in contravention of a union rule proscribing such conduct. The Supreme Court found that the right to impose such fines was incidental to the contractual relationship between the union and its members.[8] Once the member lawfully resigns, however, the union's control over that former member ceases and any attempt to impose and collect a fine from that former member for engaging in conduct prohibited by a union rule violates Section 8(b)(1)(A) of the Act.[9] In both *Granite*

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with respect to the acquisition or retention of membership therein . . . ."

Sec. 7 of the Act guarantees to employees the right to organize and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also the right to refrain from such activities.

[8] In *Allis-Chalmers, supra,* the Supreme Court did not rely on the proviso to Sec. 8(b)(1)(A) but focused its attention instead on the legislative history of the phrase "restrain or coerce" in that section of the Act.

[9] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL—CIO [International Paper Box Machine Co.]*, 409 U.S. 213 (1972); *Booster Lodge No. 405, Inter-*

State and *Booster Lodge, supra,* the Supreme Court found that the union's constitution and bylaws contained no provision restricting a member's right to resign and that, consequently, union attempts to fine former members for crossing an authorized picket line violate Section 8(b)(1)(A) of the Act. Because of the absence of any articulated restriction on a member's right to resign, the Supreme Court in *Granite State* and *Booster Lodge* expressly left open the question, now before us, of the extent to which a "contractual restriction on a member's right to resign may be limited by the Act."[10]

Addressing this question requires us to balance two fundamental principles upon which our labor laws rest, principles that inherently conflict. The first is the right of an employee to refrain from collective activity, a right specifically codified in Section 7 of the Act. The second is the legitimate interest of a certified representative in protecting employees it represents who have joined together in collective economic activity. Reasonable rules governing the acquisition or retention of membership in the union, or resignation therefrom, are necessary to protect that interest. These concerns are fundamental to the overall scheme of the Act and are recognized in the proviso to Section 8(b)(1)(A).

Guided by the Supreme Court's interpretations in this area, we find that neither of these interests is absolute. Thus, a union may impose reasonable time restrictions on the right of members to resign from the union, to facilitate the orderly management of its affairs, including times when a strike may be imminent or is underway. But, in our

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national Association of Machinists and Aerospace Workers, AFL—CIO [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973).

[10] 412 U.S. at 88; 409 U.S. at 217.

judgment, the restrictions imposed by Respondent here are unreasonable in that they fail to protect sufficiently the interest of individual employees and are, therefore, impermissible, and we so find.

A union's responsible and operational effectiveness is a key component of national labor policy and enables it to better represent the majority of its members in the collective-bargaining process. A union's most powerful economic weapon—the strike, approved by a majority of its members—is a right embedded in the Act. For a union to determine effectively whether to exercise its right to strike against an employer, it must be able to know with some degree of certainty whether solidarity among its members will be maintained. Indeed, the Supreme Court in *Allis-Chalmers, supra,* recognized that a union's interest in solidarity constitutes a fundamental part of our Federal labor policy. The Court there noted that:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes.[11]

A literal reading of Section 7 might appear to permit a union member employee to pick and choose among the union actions he wishes to support without fear of union-imposed sanctions for refusing to participate in collective activities of which he does not approve. It is already settled, however, that Section 7 is not nearly that sweeping. The Supreme Court's endorsement of the proposition in *Allis-Chalmers,* that a union may discipline members for crossing a picket line, lays to rest any claim to an absolute

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[11] 388 U.S. 175, 181.

right to refrain from union activity, and supports our finding that certain limited restrictions may be imposed on the right to resign from a union.

It is therefore apparent that a union's need to reflect the continuing will of a majority of its members, especially during a strike, reflects not only a legitimate union interest but also implements a right inherent in the statutory scheme of our labor laws. This does not mean, however, that any rule which furthers this legitimate union interest can be deemed to be valid and enforceable.

Although, as Respondent correctly points out, the proviso to Section 8(b)(1)(A) of the Act leaves it free to enact rules pertaining to the acquisition and retention of membership, the Supreme Court has found that "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1)."[12] That overriding interest is the right of an individual employee, once having joined a union, to resign from membership, which may therefore be subject only to a reasonable time limitation.

Respondent's rule prohibiting resignations during the entire course of a strike or within 14 days preceding its commencement does indeed constitute an intrusion into an employee's Section 7 right to resign. Consequently, we must determine if that rule is a reasonable restriction or whether it impermissibly contravenes other matters of concern under the national labor policy.[13]

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[12] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423, 429 (1969).

[13] In Member Fanning's view the issue in these cases is the right of an employee to exercise his Sec. 7 right to refrain from collective activity by working during a strike. Union coercion of an employee in the exercise of that right is, *prima facie*, a violation

As noted, Section 7 of the Act specifically grants employees the right to refrain from concerted activities. This right to refrain, as the Ninth Circuit correctly points out, encompasses the right of a member to resign from a union having once joined.[14] Further, this right to resign is not forever and irrevocably lost merely because an employee chooses to become a union member.[15] On the other hand, the right to resign is not a right to instantaneously abandon the union and the fellow members who have determined

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of Sec. 8(b)(1)(A). However, an employee who has joined a labor organization, enjoys full membership in that organization, and has agreed not to engage in strikebreaking, may be disciplined by internal union sanctions for violation of that undertaking. *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175. Once the employee lawfully resigns from the union, the union's power over him ends. *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213. The significance of membership in this context is simply as a defense to what otherwise would be a plain unfair labor practice: coercion or restraint of an employee in the exercise of a Sec. 7 right to work during a strike. The question is not the legality of restrictions on resignation, but rather whether or not the restrictions are effective in this context. Thus, in Member Fanning's view, it is the right to refrain from collective activity by working despite a strike—not the "right" to resign—which must be balanced against the right of the labor organization and the striking employees to wage an effective strike.

[14] 608 F.2d 1219, 1221. See also *N.L.R.B.* v. *Martin A. Gleason, Inc.*, 534 F.2d 466, 476 (2d Cir. 1976). Member Fanning does not here endorse the view that there is an independent Sec. 7 right to resign from a labor organization: Divorced from the employment relation, membership is an internal union matter.

[15] See *Local 1384, United Automobile, Aerospace, Agricultural Implement Workers, UAW (Ex-Cell-O Corporation)*, 227 NLRB 1045, 1050 (1977).

to exercise collectively their protected right to strike. A union faced with resignations during a strike maintains a continuing obligation to represent all employees in the unit, and to protect the interests of those employees who maintain their membership in the union and continue to honor the strike. Thus, important statutory and policy considerations compel us to balance the right to resign against the legitimate interest of the union, and the majority of its membership which supports the strike, in maintaining its effectiveness. We cannot, as the Charging Parties would have us do, read Section 7 in isolation from the rest of the Act.

In view of the balancing of interests required, we turn to the question of whether a union rule may permissibly differentiate between strike and nonstrike periods. The Supreme Court, in *Scofield, supra,* stated that union members must be free to leave a union to escape membership conditions that they consider onerous.[16] We find nothing in that decision or, indeed, in any of the subsequent Supreme Court decisions concerning this issue, to suggest that a member's right to leave the union and escape the rule could be limited to periods when a strike is not in progress. Rather, quite the converse appears true. In *Granite State,* the Supreme Court recognized that there may be circumstances under which a member might feel compelled to resign during a strike:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his

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[16] See *Local Lodge No. 1994, International Association of Machinists and Aerospace Workers, AFL—CIO (O.K. Tool Company, Inc.),* 215 NLRB 651, 653 (1974).

> family; the ease with which the employer replaces the strikers may make the strike seem less provident.[17]

The Court, noting that there were no restraints on a member's right to resign in that case, went on to state that "the vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime."[18]

Clearly then, the Supreme Court's remarks in *Granite State,* read in conjunction with the *Scofield* requirement that union members must be free to leave the union and escape the rule, lead inescapably to the conclusion that a member's right to resign from a union applies both to strike and nonstrike situations.[19] We hold today that a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign.

In sum, the balancing of competing interests expressed in the Act has led us to find that the right of union members to resign is not absolute. A union may place some reasonable limitation on the right to resign so long as such rules are applicable during both strike and nonstrike periods. In assessing the reasonableness of such rules, we recognize that in a strike context a union may need to reassess its bargaining strategy, to adjust its conduct at

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[17] 409 U.S. 213, 217.

[18] *Id.* at 217—218.

[19] Indeed, the Board in *Ex-Cell-O, supra,* found unenforceable a union rule that, *inter alia,* accorded no weight to the competing considerations which might have necessitated the resignation of members during a strike.

the bargaining table, and to consider whether to commence, or to continue, a strike in the face of one or more resignations based on members' unwillingness to support the strike. Moreover, there may also be administrative matters associated with the termination of membership which the union is entitled to a reasonable period to complete.

Accordingly, in order to vindicate its vital interest in assessing its strength throughout the course of a strike, and to protect those employees who have committed themselves to exercise their right to strike, we find that a union is entitled to reasonable notice of the effective date of resignations which occur immediately before or during a strike.

We realize that what may constitute a reasonable period for protecting such institutional interests under one set of circumstances may be unreasonable under another. Nonetheless, we find it salutary to set forth a general rule for the behavior of parties in this area. Having carefully considered the competing interests involved, we find that a rule which restricts a union member's right to resign for a period not to exceed 30 days after the tender of such a resignation reflects a reasonable accommodation between the right of union members to resign from the union and return to work, and the union's responsibility to protect the interests of employees who maintain their membership, as well as its need to dispose of administrative matters arising from such resignations.[20] Such a rule gives clear

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[20] Obviously, where the member has not been apprised of the existence of such a rule prior to tendering his resignation, then the member's resignation becomes effective immediately rather than upon the expiration of the 30-day period following such tender of resignation. See *General Teamsters Local 439, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Loomis Courier Service, Inc.)*, 237 NLRB

guidance to employees and unions alike concerning their respective responsibilities and further adds stability to the field of labor relations.[21]

As stated above, the Ninth Circuit found that the constitutional provision in question here constitutes a restriction on resignations.[22] We conclude that Respondent's constitutional provision as a restriction on resignations is unenforceable. Thus, Respondent's rule permits union members to resign only if the resignations are submitted no later than 14 days preceding the commencement of a strike. However, if a member chose not to exercise his right to resign or, for whatever reason, failed to do so prior to the 14-day period preceding the strike, the member was locked into the strike and prohibited from resigning until the strike ended. Such a rule is clearly contrary to our finding here and cannot be enforced. Consequently, Respondent's attempt to impose and to enforce fines on the Charging Parties pursuant to such a rule violates Section 8(b)(1)(A) of the Act. Accordingly, the Respondent shall be ordered to comply with the Board's Order as set forth in the underlying Decision herein.

220, 223 (1978); *Ex-Cell-O Corporation*, 227 NLRB at 1048. Further, where the members have been apprised of the existence of such a rule, the running of the 30-day period before the resignation becomes effective must be triggered solely by the member's notice to the union, and not contingent on any other obligations.

[21] We realize, however, that under extraordinary circumstances, a union may need more than the 30 days found reasonable herein to dispose of the administrative matters arising from the resignations. In those cases, the Board will determine whether or not circumstances exist warranting a longer period of time.

[22] We adopt this finding as law of the case only. See fn. 4, *supra*.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Machinists Local 1327, International Association of Machinists and and [*sic*] Aerospace Workers, AFL—CIO, District Lodge 115, Burlingame, California, its officers, agents, and representatives, shall take the action set forth in the Board's Order at 231 NLRB 719, dated August 29, 1977.

Dated, Washington, D.C. September 10, 1982

John H. Fanning, Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN VAN DE WATER and MEMBER HUNTER, concurring:

We agree with our colleagues in the majority that Respondent violated Section 8(b)(1)(A) by its imposition of fines against employees who resigned their union membership and returned to work during the strike. We also agree that Respondent's constitutional provision is an unreasonable restriction on the members' right to resign from the Union. Unlike our colleagues, however, we would not find reasonable a 30-day limitation on the effective date of an employee's resignation from a union.[23] As set forth below, we believe the 30-day rule promulgated by the majority is an arbitrary exercise of this Board's authority that is premised upon faulty analysis and rationale. The few arguments presented in support of the rule, in our view, are contrary to fundamental principles embodied in our Act, inconsistent with the teachings of relevant Supreme Court decisions, and represent a transparent effort to achieve a legislative result rather than a reasoned legal conclusion. Contrary to our colleagues, we would find any restriction imposed upon a union member's right to resign to be unreasonable and, therefore, we would find the imposition of any fines or other discipline premised upon such restrictions to be violative of Section 8(b)(1)(A).

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[23] Although our response to the majority is cast in terms of the majority's 30-day rule, we note with dismay that the "rule" is not so precisely contained. Thus, at fn. 21 of its Decision, the majority states that "extraordinary circumstances" may justify a restriction of longer than 30 days. Accordingly, despite the expressed desire for a "salutary" rule that provides "clear guidance," the majority has constructed a loophole tailor-made for enterprising litigators that will insure continued litigation and uncertainty in this area.

The starting point for meaningful analysis of the issue presented here is the quartet of cases[24] decided by the Supreme Court that examine the union's authority to enforce its rules against member and nonmember employees within the confines of Section 8(b)(1) and related provisions of the Act. A rather simple framework can be constructed from these holdings: (1) If an employee is not a full union member, the union may not enforce its rules against that employee; (2) if an employee is a full union member the union can, within specified limits, enforce its reasonable rules against the employee-member; and (3) if an employee resigns from the union, the union loses its authority to enforce its rules against the employee. Simply stated, the question presented here is whether a union can lawfully enforce a rule that restricts an employee's ability to place himself into the third category. In other words, can a union rule be used to compel an employee to remain subject to union discipline for 30 days beyond the employee's expressed desire to sever ties with the union?[25]

In resolving the issue before us, we believe the majority has failed to look beyond the Court's specific holdings and

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[24] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423 (1969); *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972); *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL—CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973).

[25] Concededly, the Court has not specifically passed upon the precise issue of whether a union may restrict its members' right to resign. This does not, however, give rise to what appears to be a tacit assumption by the majority, i.e., that the Board has free rein to fashion a rule that satisfies some personal sense of equity and balance. Although the actual holdings of the Court may not bind us here, the principles established in reaching those holdings cannot be ignored.

examine the principles and concepts which led to the particular results. For the Court's decisions contain findings and determinations that are clearly applicable to the issue before us. Indeed, the Court has established a specific test, largely ignored by the majority, by which the lawfulness of a union's enforcement of its rules against members and nonmembers is to be tested. We believe that a proper application of these principles and the specific test prescribed by the Court effectively preclude this Board from sanctioning a rule that restricts the right of resignation.

In *Allis-Chalmers,* the Court held that a union could discipline its full members for returning to work during a strike. In the simplest terms the Court ruled that a union's reasonable enforcement of a legitimate rule against its full members does not constitute restraint and coercion within the meaning of Section 8(b)(1).[28] In so ruling, the Court articulated a bright line distinction between "internal" and "external" union actions with the former being insulated from the proscriptions of Section 8(b)(1).

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[28] In its characterization of the Court's holding, we fear the majority has confused the Court's ruling with its own desire to reach a particular result. Thus, the majority states, "The Supreme Court's endorsement of the proposition in *Allis-Chalmers,* that a union may discipline members for crossing a picket line, lays to rest any claim to an absolute right to refrain from union activity, and supports our finding that certain limited restrictions may be imposed on the right to resign from a union." In reality, as noted above, the Court held only that such union discipline of its full members is not restraint and coercion within the meaning of Sec. 8(b)(1). While this holding may well mean that a full union member does not have an absolute right to refrain, without penalty, from concerted or other union activities, it simply does not necessarily follow that nonmembers do not enjoy an absolute right to refrain or that once a member acts to sever ties with the union that his Sec. 7 rights are any less absolute than if he never had joined the union.

The Court defined internal actions as those applying to full union members pursuant to a nonarbitrary rule aimed at achieving a legitimate union objective.[27] External actions, i.e., those proscribed by Section 8(b)(1), were defined as those aimed at interfering with an employee's employment status[28] or at interfering with the rights of nonmembers or employees outside the bargaining unit.[29] Having established this distinction, the Court found that the union's enforcement of its rules prohibiting the return to work during a strike against its full members was an internal matter and, therefore, insulated from the proscriptions of Section 8(b)(1).

Significantly, for our purposes here, the Court's establishment of a dichotomy between "internal" and "external" matters by which it sanctioned union restrictions on employee-members returning to work during a strike was not predicated upon any "balancing" of conflicting rights between unions and employees. Nor was the decision predicated upon a construction of Section 8(b)(1)(A)'s proviso which allows a union to establish rules for the acquisition or retention of membership. Instead, the Court's ruling was premised upon a detailed review of the Act's legislative history and an analysis of the Act's interrelated provisions. Accordingly, the decisive importance of whether a union action is internal or external in nature in determining whether enforcement of a union rule violates Section 8(b)(1)(A) is a concept embedded in the very fabric of our Act.

The concepts established in *Allis-Chalmers* were reiterated and expanded in *Scofield* where the Court again sanc-

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[27] 388 U.S. at 195.

[28] *Ibid.*

[29] *Id.* at fn. 25 and accompanying text.

tioned the enforcement of what was determined to be a legitimate union rule on the basis that it was an internal union matter.[30] In so doing, the Court reiterated that a union's authority to discipline employee-members is limited to actions that are purely internal in nature.[31] In addition, the Court, for the first time, precisely articulated the test to be utilized in evaluating the lawfulness of attempts to enforce union rules. Thus, the Court held that:

> § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.[32]

In *Granite State*,[33] the Court confronted a situation where the union sought to enforce its legitimate rule against returning to work during a strike in an external manner, i.e., against nonmembers. Applying the *Scofield* test, the Court found that such efforts violated Section 8 (b)(1)(A). Because, in our view, the Court's decision in *Granite State* effectively undermines the purported bases for establishing a 30-day limit on resignations, we feel it is necessary to give that decision more than the cursory treatment provided by the majority.

In *Granite State*, the union membership, several days before the existing collective-bargaining agreement ex-

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[30] The union rule at issue imposed production ceilings and provided that union members who exceeded these ceilings would be subject to fines.

[31] 394 U.S. at 435—436.

[32] *Id.* U.S. at 430.

[33] 409 U.S. 213 (1972).

pired, authorized a strike if agreement on a new contract was not reached by a specific date. No agreement was reached and a strike commenced. A few days into the strike the employees met and *unanimously* adopted a resolution which provided that a member who "aided or abetted the Company during the strike" would be subject to a fine of up to $2,000. Six weeks into the strike, two members resigned their union membership and returned to work. Beginning 6 months later, 29 members resigned and returned to work. The union imposed fines against all 31 employees.

The Board held that the fines against all 31 employees violated Section 8(b)(1)(A).[34] The Court of Appeals for the First Circuit, however, denied enforcement of the Board's Order.[35] The First Circuit reasoned that, because the employees had mutually relied upon each other's commitment to strike, all employees were bound to honor the strike under a "mutual subscription" theory. The court also advanced the theory that a union's interest in strike solidarity could be reconciled with Section 7's right to refrain by treating an employee's agreement to join a strike and impose sanctions for strikebreaking as a waiver of his or her Section 7 right. Responding to the *Scofield* test, the First Circuit explained that it did not read *Scofield* as requiring that a union member be "free to leave the union and escape the rule" at any time and under all circumstances. Nor did the court find a deleterious impact on Federal labor policy, since the court concluded that the employee-members had waived their Section 7 rights.

In an eight-to-one decision,[36] the Supreme Court reversed the First Circuit and found that the fines imposed violated

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[34] 187 NLRB 636 (1970).

[35] 446 F.2d 369 (1st Cir. 1971).

[36] Chief Justice Burger rendered a concurring opinion which provided, *inter alia*, that "where the individual employee has

Section 8(b)(1)(A). In its decision, the Court began by reiterating the *Scofield* test and by again emphasizing the distinction between a union's internal and external actions. As for the latter concept, the Court stated:

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.[37]

The Court then addressed the First Circuit's contention that the employees had waived their Section 7 rights by the strike vote and the authorization of fines for strike-breaking, stating: "We give that factor little weight."[38] In this regard, and also in response to the lower court's reliance upon the union's interest in strike solidarity, the Court stated:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. . . .

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freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership." 409 U.S. at 218 (Chief Justice Burger, concurring.)

[37] 409 U.S. at 217.

[38] *Id.*

> [W]e conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that *his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.* [409 U.S. at 217—218. Emphasis supplied.] [39]

Finally, in *Booster Lodge*,[40] a unanimous Court [41] found that the union violated the Act by fining employees who returned to work after resigning their membership. In large part, the Court simply applied its past decisions in this area. Of significance, however, is the Court's disposal of the union's claim that its rule had been consistently interpreted to bind an employee to a strike notwithstanding his resignation. After noting that no such interpretation had been found by the Board and the court of appeals, the Court stated:

> But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in [*Granite State*]. [412 U.S. at 89.]

From the foregoing, it is plain that there are certain fundamental principles that must be applied in evaluating a union rule restricting an employee-member's right to

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[39] The oft-quoted "May to November" change-of-mind period is somewhat inaccurate inasmuch as two of the fined employees resigned within 6 weeks of the strike's commencement and the fines against them were found violative of Sec. 8(b)(1)(A).

[40] 412 U.S. 84 (1973).

[41] Justice Blackmun, who was the lone dissenter in *Granite State*, rendered a concurring opinion.

resign for a 30-day (or any other) time period. First, the rule must be nonarbitrary and aimed at advancing a legitimate union interest. Second, there is inherent in the very fabric of our Act a bright line distinction between internal and external union actions. So long as the union action in [*sic*] wholly internal in nature, it may be lawful. When its reach becomes external, it runs afoul of Section 8(b)(1)(A). Third, a union rule can survive scrutiny only if it does not impair a policy Congress has embedded in the labor laws. Fourth, union rules that have been found lawful in the past have contained the implicit safeguard which provides that the rule must be reasonably enforced against union members who are free to leave the union and escape the rule. Finally, once an employee becomes a union member, he cannot be bound forever to the rules and coercive force of the union, but must be allowed to change his mind based upon subsequent developments. We contend that, when measured against these standards, the 30-day rule espoused by our colleagues must fall.

Unfortunately, however, before proceeding to what we deem to be the appropriate analysis, we are compelled to respond to the majority on its own terms because so many of the fundamental concepts enumerated above are ignored by our colleagues. Instead of a meaningful legal analysis, the majority presents what amounts to a seemingly self-evident syllogism which goes as follows: (1) employees have a Section 7 right to refrain from concerted activities; (2) unions have a legitimate interest in maintaining strike solidarity and protecting the interests of employees who honor a strike decision; (3) neither the employees' rights nor the union's interests are absolute; (4) if the Board selects a time period for restricting resignations, the conflicting interests will be accommodated and justice will be served. As is often the case with syllogistic arguments, the conclusion only follows if all the premises are correct. We respectfully submit that some of our colleagues' prem-

ises are fatally flawed and that purported "balancing" is little more than a preemptive striking of a compromise best left in the legislative arena.

Clearly, we agree with the first premise. The text of Section 7, by its very terms, grants employees the *right* to refrain from union and other concerted activities.[42] Nor can there be serious quarrel with the premise that unions have a legitimate *interest* in maintaining strike solidarity and protecting the interests of striking employees.

The third premise is another matter, however, since there we find a fundamental flaw in the majority's analysis. For when our colleagues adopt the proposition that neither

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[42] Specifically, two related Sec. 7 rights are involved here—the right to resign membership in a union, and the right to return to work during a strike. *Booster Lodge, supra*, 412 U.S. at 87—88; *Granite State, supra*, 409 U.S. at 217—218; *N.L.R.B.* v. *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL—CIO, District Lodge 115* [*Dalmo Victor*], 608 F.2d 1219, 1221 (9th Cir. 1979); *N.L.R.B.* v. *International Association of Machinists and Aerospace Workers, Merritt Graham Lodge No. 1871* [*General Dynamics Corp.*], 575 F.2d 54, 55 (2d Cir. 1978).

The preservation of employee freedom in this sphere is also manifested in Sec. 8(b)(2) and the second proviso to Sec. 8(a)(3). For those provisions work to insure that no employee can be compelled to become a full union member, thereby leaving an employee who so chooses free to refrain from union or other concerted activities. *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963): "'Membership' as a condition of employment is whittled down to its financial core." Thus, the Board has held, with court approval, that a union violates Sec. 8(b)(1)(A) when it refuses to accept the resignations of employees on the ground that full membership is a condition of employment. *United Stanford Employees, Local 680, Service Employees International Union, AFL—CIO (The Leland Stanford Junior University)*, 232 NLRB 326 (1977), enfd. 602 F.2d 980 (9th Cir. 1979).

the employee *rights* at issue nor the union *interests* being advanced are absolute, they implicitly equate the express Section 7 rights of employees with a union's institutional interest in strike solidarity, thereby setting the stage for their purported "balancing" of "conflicting interests." Yet, such an equation ignores the fact that it is not the mere existence of conflict between labor disputants that mandates and justifies an "accommodation" or "balancing." Instead, the substantial diminution of express statutory rights is warranted only when the statutory right collides with a corresponding *right* of relatively equal import and legal significance.[43] We contend most strongly that the express Section 7 rights of employees are surely more than mere "interests" subject to limitation because their operation somehow impinges upon the institutional desires of a union. Conversely, a union's institutional *interests*, to our knowledge, have never been elevated to the point where they stand on equal footing with, and, indeed, override and negate the fundamental protections of Section 7. Thus, under the banner of "balancing," our colleagues negate for 30 days the express employee protections afforded by one of the Act's most important provisions. One can only wonder what other rights granted by the Act will be diminished or eliminated upon the majority's discovery that they too conflict with a "legitimate interest" of a union or an employer. In short, by equating institutional "interests" with statutory "rights" and utilizing the existence of "conflict" between disputants to justify reduction of the Act's protections, we respectfully submit that our colleagues are engaging in legislating

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[43] There are, of course, rights of sufficient import and significance to justify the imposition of some limitations on employees' Sec. 7 rights. See, e.g., *N.L.R.B.* v. *The Babcock & Wilcox Company*, 351 U.S. 105 (1956), which strikes a balance between employees' Sec. 7 rights and the property rights of individuals that are grounded in Common Law and the Constitution.

rather than interpreting our Act's intent and objectives. This they may not do.

Even granting the premise that employees' statutory rights and the union's institutional interests are subject to balancing and mutual accommodation, we suggest that the majority's rule does not give sufficient consideration to all of the relevant circumstances. Thus, it seems to us that the majority underplays the significance of the practical realities facing an employee in a strike situation that the Court enumerated in *Granite State* in support of the concept that a union member must "be free to refrain in November from actions endorsed in May."[44] Indeed, as noted in footnote 39, *supra*, this period is more accurately one of 6 weeks. For nowhere in the majority opinion is there any meaningful attempt to explain why a member would not be free to refrain from an action he agreed to 30 days earlier but is free to do after 42 days.[45] Nor does the majority appear to take into account the Court's concern for an employee who initially supports the strike but later undergoes a change of mind because of family hardship or the relative ease with which the employer is able to secure permanent replacements.[46] Again, if we are to

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[44] 409 U.S. at 217—218.

[45] Indeed, apart from stating the need for a "salutary" rule that eliminates confusion, we are at a total loss in perceiving the significance of 30 days as a benchmark. Why is 10 days too short a period? Why is 31 days too long? We would hope that our colleagues have some nonarbitrary basis for the selection of this time period. For if they do not, their action is nothing more than an arbitrary act of legislative compromise.

[46] It should not be forgotten that an employer can and often does hire replacements immediately after a strike commences. While a 30-day waiting period, enforceable by substantial fines, may appear to some to be "reasonable," the real life dilemma created

balance employee rights against union interests, substantially more consideration of the dilemma faced by an employee who cannot continue to adhere to a strike without placing himself and his family in dire financial straits is surely required.[47]

Apart from the fact that the 30-day rule fails in its own "balancing" premise, it also fails to withstand scrutiny under the relevant Court decisions discussed above. Initially, in this regard, it is clear that, by promulgating a 30-day restriction on resignations, this Board is seeking to redefine the internal/external dichotomy which the Supreme Court has found to be embedded in our Act's very fabric. As discussed in detail above, the Court has consistently interpreted the Act and its underlying purposes to prohibit a union from exercising its coercive power in external matters. A primary basis for defining external versus internal matters has been the fact of the employee's union membership. Yet, by allowing a union to compel an employee to remain a member subject to the union's rules

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for an employee subjected to the rule is that his job may well be long gone by the time he is able to take any meaningful steps to retain it.

[47] When viewed in the context of potentially severe hardships visited on employees who are precluded from refraining from a strike for 30 days, one questions the majority's willingness to adhere to the Court's admonition that, in balancing conflicting rights, any accommodation must be achieved "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox, supra* at 112. Surely a union is vested with sufficient lawful means of persuasion and peer pressure to preserve strike solidarity without requiring suspension of the Act's fundamental protections. In fact, if a union is unable to preserve strike solidarity through less restrictive means than sanctions that override the Act's protections, perhaps it should reconsider its decision to strike in the first place.

and authority for 30 days beyond an expressed desire to resign, the majority has effectively altered the internal/external distinction which Congress has so carefully embedded in the Act. And the majority has accomplished this end by creating the *fiction* of continued full membership.[48] Thus, unions will be able to expand substantially their domain of authority and to regulate conduct heretofore beyond its control merely by adopting a "rule" that establishes a facade of full membership for 30 days. In other words, by a mere convention vote, a union can transform a plainly external action into an internal one and thereby insulate itself from the intended scope and objectives of the Act.[49]

The 30-day rule also fails to pass muster under the *Scofield* test, reiterated in *Granite State* and *Booster Lodge*. Under that test, a union rule must (1) serve a legitimate union interest; (2) impair no policy Congress has em-

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[48] It bears emphasis that this fiction of continued membership arises not out of the employees' expressed desires or the practical realities of the situation but, instead, is the creation of a union rule. Thus, a boilerplate provision in a union's constitution or bylaws that can be adopted and operate in an inflexible manner, oblivious to the circumstances facing the member in a strike situation, can serve to circumscribe dramatically an employee's statutory rights and potential economic livelihood. Such "agreements" that result from union membership have accurately been termed contracts of adhesion. See *Summers, Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049; Sould, *Some Limitations Upon Union Discipline Under the NLRA: The Radiation of Allis-Chalmers*, 1970 Duke L.J. 1137 (1970).

[49] It seems self-evident that merely because a union adopts a rule all conduct by employees that violates that rule is not, *ipso facto*, an internal union matter. The majority seems to forget, however, that the internal/external determination turns upon the scope and impact of the rule and not on the internal source of the rule's creation.

bedded in the labor laws; and (3) leave members free to leave the union and escape the rule. We respectfully submit that to the extent the majority opinion even seeks to apply this test, it, once again, confuses the applicable concepts and distorts the appropriate analysis.

Plainly, a union's interest in maintaining strike solidarity is a legitimate one that satisfies the first part of the *Scofield* test. As for the second part of the test, however, the 30-day rule runs directly afoul of at least three policies Congress has embedded in the labor laws, i.e., the right of employees to refrain from concerted activities and the policy, discussed above, limiting the coercive authority of unions to wholly internal matters. Still a third policy negated by the 30-day rule is that embodied in Section 8(b)(2) and in the proviso to Section 8(a)(3) which together allow a union to compel core membership, but prohibit it from compelling full membership.

We can only presume that the majority seeks to negate these impositions on statutory policy by again relying on the union's interest in strike solidarity. Yet, the existence of a legitimate union interest is nothing more than a threshold issue in determining the lawfulness of a union rule. For if the mere existence of a legitimate union interest is sufficient to overcome the policies Congress has embedded in the Act, why, pray tell, has the Supreme Court consistently treated the two as separate and distinct conjunctive requirements? We submit that to utilize the legitimate union interests in strike solidarity to satisfy the initial prong of the *Scofield* test, and then revive it to negate congressional policy in addressing the second prong of the test, renders the three-part test redundant and virtually useless.[30] Indeed, in *Granite State* the Court recog-

[30] Here again, a major flaw in the majority's analysis springs from the faulty premise that union interests and statutory rights are coequals that can serve to negate each other and compel that a "balance" be struck between them.

nized that a union advanced a legitimate interest in seeking to prohibit the return to work during a strike. But the Court then moved to the second part of its test and declared that "§ 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." [51]

Regarding the final portion of the *Scofield* test, a rule restricting resignations for 30 days is not a rule reasonably enforced against union members who are free to leave the union and avoid the rule. Nor is it mere sophistry to rely on this factor in striking down a restriction on resignation. For this prong of the test represents more than a consideration to be applied only in cases that do not involve resignation rules. Indeed, it embodies an essential safeguard in protecting individuals' Section 7 rights and limiting the coercive power of unions. Nor can that safeguard be eliminated without doing violence to the Act's interrelated provisions and to the precise objectives of Congress. In short, at least part of the justification for allowing the union to enact and enforce the rule in the first place is that the member is free to leave the union and thus escape the application of that rule. To allow a union to

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[51] 409 U.S. at 218. Of course, in *Granite State* there was no union rule restricting resignation although the employees there had voted to impose sanctions on themselves for any strikebreaking activity. Thus, the only substantial difference here is a union rule adopted for the avowed purpose of restricting strikebreaking rather than an employee-adopted rule with the same objective. We fail to see how the employee rule is insufficient to negate congressional policy while a union rule with the same objective can overcome the intent of Congress. Indeed, binding an employee into forsaking his statutory rights for 30 days by invoking a union rule is yet another step removed from the employees' self-limitations found insufficient in *Granite State* and also fails to take into account the plain adhesive nature of the so-called employee/union contract. See fn. 48, *supra*.

eliminate this safeguard is simply to cede congressional authority to various private parties.

In summary, we believe the majority's 30-day restriction on resignations is premised upon sham "balancing" that represents nothing more than an arbitrary compromise over how far a union can unilaterally abrogate individual statutory rights and the congressional scheme of labor relations. The 30-day rule runs directly counter to relevant Supreme Court precedent, ignores the test prescribed for evaluating the validity of a union's rules, and generally violates a host of principles and policies embedded in our Act.

Finally, since the majority has set forth what it would hold in an appropriate case, we shall state our view. Any union rule that restricts a member's right to resign is unreasonable and any discipline taken by a union against an employee predicated on such a rule violates Section 8 (b)(1)(A). In addition, for a resignation to be valid, it must be in writing and is effective upon receipt by the union.[52] Finally, we would hold that a union may not condition a resignation upon the payment of any dues or assessments. Clearly enough, the union, like an employer, is able to recoup any moneys owed it through regular legal proceedings and we find no basis for holding an employee hostage by prohibiting resignations until such fiscal matters are settled.

Dated, Washington, D.C. September 10, 1982

John R. Van de Water, Chairman
Robert P. Hunter, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[52] We do not view such requirements as "restrictions" on resignation. Rather, they are simply the ministerial acts necessary to ensure that a member's resignation is voluntary and has, in fact, occurred.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I remain convinced[33] that Respondent's constitutional provision prohibiting resignations during a strike or within 14 days preceding its commencement is a reasonable and valid restriction on members' resignations, protected by the proviso to Section 8 (b)(1)(A) of the Act. Accordingly, I would dismiss the complaint in its entirety.

This proceeding was submitted to the Board through a stipulation of facts. The complaint alleged that Respondent violated Section 8(b)(1)(A) by fining three of its members who, during the course of an officially sanctioned strike against the Employer, attempted to resign their memberships in Respondent and thereafter crossed Respondent's picket line to return to work for the Employer. The stipulated record reveals that Respondent has been the collective-bargaining representative of the Employer's employees since approximately 1949. On or about April 19, 1974, Respondent held a meeting of its members and informed them of a then newly adopted constitutional amendment which provided as follows:

> *Improper Conduct of a Member* . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line

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[33] See my previous dissent in this proceeding, reported at 231 NLRB 719, 722 (1977).

for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

At all times since that meeting, the individual Charging Parties, each of whom was an employee of the Employer, have been aware of the constitutional provision. On June 3, 1974, Respondent held another membership meeting for the purpose of taking a strike vote. Prior to the actual strike vote, Respondent again informed its members, including the individual Charging Parties, about the constitutional provision and warned them that anyone crossing the picket line could be fined. On the same date, following affirmative authorization of the membership through the strike vote, Respondent and its membership, including the Charging Parties, began an economic strike against the Employer and established a lawful picket line. The strike continued, and the picket line was maintained, during all times relevant herein. On February 14, 1975,[54] Charging Parties Hall and Lapinski resigned membership in the Union and, on February 18, returned to work at the struck plant. The Union received notice of these resignations on February 19. On April 16, the Union fined Hall and Lapinski $2.277.50 each for working behind the Union's picket line. The amount of the fines equalled the sum received by Hall and Lapinski from the Union as strike benefits during the period that they honored the picket line. Thereafter, on May 8, Charging Party Gomes submitted her resignation from membership. The Union received Gomes' resignation on May 10, and she returned to work at the struck plant on May 12. On August 6, the Union fined Gomes $1,125 for working behind the Union's picket line. Again, the amount of the fine equaled the sum Gomes re-

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[54] Unless otherwise noted, all dates hereinafter are in 1975.

ceived as strike benefits while she observed the Union's picket line.[55]

The majority accepts all of the foregoing, as they must, but despite these uncontroverted facts decides today that Respondent's actions in fining the Charging Parties for violating its duly adopted constitutional provision were contrary to Section 8(b)(1)(A) of the Act, holding that the constitutional provision quoted above is *per se* illegal. I cannot agree. Rather, I would find that Respondent was entitled to levy fines against the Charging Parties as a means of enforcing a lawful constitutional provision governing retention of membership, a subject expressly excluded from the scope of Section 8(b)(1)(A) by the proviso thereto, and within the ambit of a union's control over its internal affairs.

Any analysis of the issues presented herein must begin with an examination of the Supreme Court's decisions in *Allis-Chalmers*,[56] *Granite State*,[57] and *Booster Lodge*.[58] In *Allis-Chalmers*, the Supreme Court held that a union rule prohibiting its members from crossing an authorized picket line or returning to work during the course of a strike was a legitimate internal regulation of the conduct of its members, and that neither the rule nor its enforcement against members through imposition of court-enforceable

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[55] There is no allegation that the amount of the fines was unreasonable or excessive.

[56] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

[57] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972).

[58] *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL—CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973). Also, see *N.L.R.B.* v. *Boeing Co., et al.*, 412 U.S. 67 (1973).

fines was violative of Section 8(b)(1)(A) of the Act. In *Granite State* and *Booster Lodge*, the Supreme Court held that sanctions against former members who resigned their membership prior to crossing authorized picket lines were violative of Section 8(b)(1)(A) of the Act, reasoning that "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street."[59] It must be stressed, however, that in both *Granite State* and *Booster Lodge* the Court expressly limited its holding to factual situations where, as in those cases, there was no constitution or bylaw provision defining or limiting the circumstances under which a member could resign from the union.[60] Indeed, the Court specifically reserved for later consideration the question now before the Board; to wit, "the extent to which contractual restriction on a member's right to resign may be limited by the Act."[61]

In examining this issue, I am guided by the explicit terms of Sections 7 and 8(b)(1)(A) of the Act, and by the Supreme Court's interpretation of Section 8(b)(1) contained in its decision in *Scofield, et al.* v. *N.L.R.B.*[62] Briefly stated, Section 7 gives all employees the right to engage in union and concerted activities, or to refrain from those activities. Section 8(b)(1)(A) provides that it shall be an unfair labor practice for any labor organization to restrain or coerce employees in the exercise of the rights guaranteed them by Section 7. Importantly, however, Congress expressly limited the breadth of Section 8(b)(1)(A) by including therein a proviso specifying that such provision "shall not impair the right of a labor organization

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[59] *Granite State*, supra at 217.

[60] *Granite State*, supra at 216, 217; *Booster Lodge, supra* at 88.

[61] *Booster Lodge*, supra at 88.

[62] 394 U.S. 423.

to prescribe its own rules with respect to the acquisition or retention of membership therein . . . . " These interrelated provisions were addressed by the Supreme Court in *Scofield*. There, the Court stated that it had taken and would continue to take a dual approach to the problem of evaluating the validity of union fines under Section 8(b)(1)(A) of the Act, such that properly adopted union rules, reflecting legitimate union interests, which impair no policy Congress has imbedded in the labor laws, and which are reasonably enforced against members, are permissible under that section, whereas fines against nonmembers would violate that section. That statement reflects the Court's view, set forth in *Scofield* and in *Allis-Chalmers*, that union rules and their enforcement are an internal union matter governed by contractual considerations as embodied in the union's constitution and bylaws, which are agreed to by the members in consideration for the benefits attained by membership.

Applying the *Scofield* criteria to the constitutional provision here in issue, there can be no doubt but that the provision was properly adopted by the Union and its membership, a fact conceded by my colleagues. There also is no doubt but that the provision reflects legitimate union interests. As the Supreme Court observed in *Allis-Chalmers*:[63]

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative

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[63] *Supra* at 180—181.

to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."

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Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ."

Finally, as there is no contention that Respondent's constitutional provision or the fines levied under that policy were, in any way, other than reasonably enforced against its members, there remains for consideration only the issue of whether Respondent's constitutional provision so impairs a policy Congress has embedded in the labor laws that said provision is *per se* violative of Section 8(b)(1)(A) of the Act. I conclude that this inquiry must be answered in the negative. Obviously, the constitutional provision contains some restriction on members' rights, but where, as here, the members freely, knowingly, and expressly agree to such limitations in order to attain the additional strength such a prior commitment gives to the strike as an economic weapon, I can perceive no reason in Board law, Supreme Court precedent, or overall labor policy to declare such a prior commitment a nullity.[64] It

[64] For the reasons set forth in my previous dissent in this proceeding, cited above, I would overrule *Local Lodge No. 1994, Inter-*

must be stressed that the constitutional provision here in issue does not constitute a flat prohibition on all resignations, but merely restricts their effect during ongoing, lawful strikes in order to protect the Union and its members who honor their prior commitment not to engage in strikebreaking.

In effect, the provision permits the Union to enforce its contract with each member—a contract which was freely entered into by all parties—and thereby protect its other members then exercising "the ultimate weapon in labor's arsenal."[65] The member may, of course, prevail upon his fellow members to cease their concerted activity or to alter the rule but voluntarily having accepted the benefits and liabilities occasioned by union membership, including an express agreement not to resign membership during a strike and thereafter cross the union's picket line, I would not permit that member thereafter to breach his contract with the union unilaterally and thereby, in effect, "have his cake and eat it too."

In sum, I would find that the Union's constitutional amendment prohibiting members from resigning during the course of a strike was a reasonable and valid restriction on resignation, protected by the proviso to Section 8(b)(1)(A) of the Act. Accordingly, I would dismiss the complaint in its entirety.

Dated, Washington, D.C. September 10, 1982

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

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national Association of Machinists and Aerospace Workers, AFL—CIO (O.K. Tool Company, Inc.), 215 NLRB 651 (1974), to the extent it is inconsistent with this opinion.

[65] *Allis-Chalmers, supra* at 181.

APPENDIX C

Decisions and Orders of the National Labor Relations Board

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(3) Decision and Order in *District Lodge 160*, Entered December 16, 1982

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DISTRICT LODGE 160, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO, AND ITS AFFILIATED LOCAL LODGE 1028
(Gray Motors, Inc.)

and Case 19—CB—3982

ROBERT C. FERGUSON, an Individual

DECISION AND ORDER

Upon a charge duly filed by Robert C. Ferguson, the Regional Director for Region 19 of the National Labor Relations Board, acting on behalf of the General Counsel of the Board, issued a complaint alleging that Respondent District Lodge 160, International Association of Machinists and Aerospace Workers, AFL—CIO, and its affiliated Local Lodge 1028 violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended.[1] Respondent filed an answer to the complaint in which it admitted certain allegations of the complaint and denied others, including all those charging it with the commission of any unfair labor practices.[2]

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[1] The parties stipulated that District Lodge 160 is an umbrella organization for five western Washington local lodges, including Local Lodge 1028. As such, District Lodge 160 is composed of the five local lodges and provides all five with a common full-time paid staff and office in Tacoma, from which administrative services for all five local lodges are handled. The parties stipulated that District Lodge 160 and Local Lodge 1028 in effect constitute a single labor organization.

[2] The complaint and notice of hearing was issued on February 25, 1981. Respondent filed its answer to the complaint on March 9, 1981.

On June 27, 1981, the General Counsel, the Charging Party, and Respondent entered into a stipulation in which they agreed to certain facts relevant to the issues in this proceeding. They also agreed to waive a hearing before an administrative law judge, the issuance of an administrative law judge's decision, and the presentation of any evidence other than that contained in the stipulation and the exhibits there referred to. By order dated October 26, 1982, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel filed a brief with the Board.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the brief that was submitted by the General Counsel, and makes the following:

Findings of Fact

I. The Business of the Employer

Gray Motors, Inc., the employer of the Charging Party, has been at all times material herein a Washington corporation, with an office and place of business in Port Angeles, Washington, where it is engaged in the business of selling and servicing motor vehicles. During the past 12 months, which period is representative of all times material herein, in the course and conduct of its business operations, Gray Motors, Inc., herein called the Employer, had gross sales of goods and services valued in excess of $500,000[*sic*]. During the past 12 months, the Employer, in the course and con-

[3] Although provided an opportunity to file briefs in support of their respective positions, it should be noted that neither the Charging Party nor Respondent chose to do so.

duct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside said State or from suppliers within said State which in turn obtained such goods and materials directly from sources outside said State. Accordingly, we find, in agreement with the parties, that Gray Motors, Inc., has been at all times material herein an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. The Labor Organization

The parties stipulated and we find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

At all times relevant, Respondent has been the bargaining representative of employees of the Employer and Robert Ferguson has been an employee of the Employer. At all times relevant, the International constitution of the International Association of Machinists and Aerospace Workers, AFL—CIO, contained the following language set forth as article I, section 3:

> *IMPROPER CONDUCT OF A MEMBER*
>
> The following actions or omissions shall constitute misconduct by a member . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of

the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement.

On or about May 6, 1980,[4] at a regular union meeting of Local Lodge 1028 at which Ferguson was present, copies of a flyer containing the language set forth above were handed to members who were present. On or about June 3, at a regular meeting of Local Lodge 1028 at which Ferguson was present, a strike vote against the Employer and certain other automobile dealers in Port Angeles was taken and passed. The constitutional provision set forth above was communicated to those present, including Ferguson, at the June 3 meeting. On or about June 11 or 12, a strike commenced against the Employer and other employers. On or about June 12, Ferguson wrote to Respondent resigning his union membership and this letter was received by Respondent on June 13. On or about June 13, Ferguson returned to work at the Employer's facility and thereafter continued to work there for the balance of the strike. On or about September 26, Ferguson was served with notice of a disciplinary hearing or trial to be conducted by Respondent upon charges brought against him as a result of his working at the Employer's facility during the strike. This hearing was held pursuant to notice on October 8, and the results thereof were confirmed by vote of a majority of the members present at a meeting of Local Lodge 1028 on November 4. On November 13, Respondent, by letter, advised Ferguson that, as a result of the foregoing proceedings, he had been fined $60 per day for each of the 23 days on which he worked at the Employer's facility while Respondent was on strike against the Employer.

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[4] All events hereinafter occurred in 1980 unless otherwise noted.

In the complaint, the General Counsel alleges that Respondent, by fining Ferguson in the manner set forth above, violated Section 8(b)(1)(A) of the Act.[5] While neither the Charging Party nor Respondent chose to file briefs stating their positions, in his brief the General Counsel contends that the Board's recent decision in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL—CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB No. 141 (1982), controls our decision in the instant case. We agree with the General Counsel.

In *Dalmo Victor,* Members Fanning and Zimmerman found that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction of a member's Section 7 right to resign."[6] Chairman Van de Water, in his and Member Hunter's concurrence in *Dalmo Victor,* found "any restriction imposed upon a union member's right to resign to be unreasonable." As set forth above, the parties stipulated that Respondent's constitution prohibits resignations during the entire course of a strike or within 14 days preceding its commencement. Therefore, under the view expressed by Members Fanning and Zimmerman in *Dalmo Victor;* and under the view expressed by Chairman Van de Water

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[5] Based on the facts as set forth above, the parties stipulated that no claim is being made that Respondent violated the Act by levying a fine upon Ferguson for working on June 13, but rather that Respondent violated the Act with respect to the fines levied for the 22 days Ferguson worked after he had duly resigned from Respondent.

[6] Member Fanning views the issue in these cases as the right of an employee to exercise his Sec. 7 right to refrain from collective activity by working during a strike. See *Dalmo Victor, supra* at fn. 13. He agrees that the union constitution clause herein prohibiting resignation during a strike is an unreasonable rule.

in *Dalmo Victor,* the union provision at issue here is an unreasonable restriction on resignation. Accordingly, Respondent's attempted enforcement of its constitutional provision violated Section 8(b)(1)(A).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above, occurring in connection with the Employer's operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, we shall order it to cease and desist therefrom. In order to effectuate the purposes of the Act, we shall also order Respondent to rescind the unlawful postresignation fines, and to refund any money paid to it as a result of such fines, with interest. See *Florida Steel Corporation,* 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962)). We shall also order Respondent to post the notice attached as an appendix to this Decision and Order.

Conclusions of Law

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing fines on former member Robert C. Ferguson, who had duly resigned from the Union, for his postresignation crossing of a sanctioned picket line and working during a strike at Gray Motors, Inc., Respondent restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, District Lodge 160, International Association of Machinists and Aerospace Workers, AFL—CIO, and its affiliated Local Lodge 1028, Tacoma, Washington, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees who have resigned from, and are no longer members of, Respondent in the exercise of the rights guaranteed them in Section 7 of the Act by imposing fines on such employees because of their postresignation conduct in working at Gray Motors, Inc., during the strike which began in June 1980.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the fines levied against Robert C. Ferguson because of his postresignation work for Gray Motors, Inc., during the strike which began in June 1980, and refund to him any money he may have paid as a result of such fine, plus interest.

(b) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 19 signed copies of said notice for posting by Gray Motors, Inc., if the Company is willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, after being duly signed by Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. December 16, 1982

John R. Van de Water, Chairman
John H. Fanning, Member
Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[Appendix omitted]

APPENDIX D

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACHINISTS LOCAL 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent,

and

VIOLA LAPINSKI, HILDA HALL, and POLMYRA GOMES,

Intervenors.

Nos. 82-7580 & 82-7701

FILED
Jul 10 1984
Phillip B. Winberry
Clerk, U.S. Court
of Appeals

DISTRICT LODGE 160, International Association of Machinists and Aerospace Workers, AFL-CIO, and AFFILIATED LOCAL LODGE 1028,

Petitioners,

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

ROBERT C. FERGUSON,

Intervenor.

Nos. 83-7052 & 83-7089

ORDER

Before: TUTTLE* and MERRILL, Senior Circuit Judges, and PREGERSON, Circuit Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and an active judge called for an en banc vote. The matter failed to receive the vote of a majority of the active judges in favor of en banc consideration. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Elbert P. Tuttle, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

APPENDIX E

Pertinent Parts of the
Labor Management Relations Act, 1947,
29 U.S.C. §§ 141-197 (1982),

and the

National Labor Relations Act,
29 U.S.C. §§ 151-169 (1982)

SUBCHAPTER I—GENERAL PROVISIONS

§ 141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * * *

SUBCHAPTER II—NATIONAL LABOR RELATIONS

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept

the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and mem-

bers have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

• • • •

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the

initiation fees uniformly required as a condition of acquiring or retaining membership.

• • • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • • •

Supreme Court, U.S.
FILED
OCT 26 1984
ALEXANDER L. STEVAS
CLERK

Nos. 84-494 & 84-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
Respondents.

VIOLA LAPINSKI, *et al.*,
Petitioners,
v.
MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
Respondents.

On Petitions for a Writ of Ceritorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE RESPONDENT UNIONS

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
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MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
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Respondents.

On Petitions for a Writ of Ceritorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR THE RESPONDENT UNIONS

The first reason for granting the National Labor Relations Board's petition for a writ of certiorari in No. 84-494 stated therein is that:

> The decision of the court of appeals that a union does not commit an unfair labor practice by enforcing a [union] constitutional provision restricting resignations during a strike or within 14 days preceding its commencement is * * * in direct conflict with the decision of the Seventh Circuit in *Pattern Makers League v. NLRB*, 724 F.2d 57 (7th Cir. 1983) * * *.
>
> The conflict between the Seventh and Ninth Circuits concerns an important and recurring question under the Act, which this Court has expressly left open on two occasions. [See] *NLRB v. Granit State Joint Board, Textile Workers Union*, [409 U.S. 213 (1972)] and *Booster Lodge No. 405, International Association of Machinists v. NLRB*, 412 U.S. 84 (1973) * * *. Now that the Board has decided that important question and the Board's decision has precipitated a direct conflict in the circuits, it is appropriate for the Court to settle the issue. [NLRB Pet. 7-10. See, to the same effect, the petition for a writ of certiorari in *Lapinski, et al. v. Machinists*, No. 84-528, pp. 7-8, 13-14.]

The respondent unions agree with the foregoing but suggest that in light of the following considerations the certiorari petitions in Nos. 84-494 and 84-528 should be held on the Court's docket.

1. On October 1, 1984 the Court granted the petition for a writ of certiorari in *Pattern Makers League of North America, AFL-CIO, et al. v. NLRB, et al.*, No. 83-1894, and thereby agreed to review the Seventh Circuit's decision in conflict with the Ninth Circuit's decision herein. *Pattern Makers* is presently scheduled to be argued in the January, 1985 session; granting the petitions here and consolidating the cases would in all likelihood require rescheduling and delaying the submission of the *Pattern Makers* case.

2. It does not appear that there is any significant difference between *Pattern Makers* and the instant cases of the kind that would assist the Court in better under-

standing the common question presented in that case and in these or that question's ramifications. While the union rule at issue in *Pattern Makers* and the rule at issue here are different in form, the NLRB has, in the underlying proceedings leading to these certiorari petitions, treated the two as legally indistinguishable and states in its petition "We do not believe that the difference between the provision in *Pattern Makers* and the one in the instant case is legally significant." NLRB Pet. 8 n. 7. It is our position that in this one respect the Board's reasoning cannot be faulted.[1]

CONCLUSION

For the above-stated reasons, the petitions for a writ of certiorari in these cases should be held for further action pending the disposition of *Pattern Makers League of North America, AFL-CIO, et al. v. NLRB, et al.*, No. 83-1894, petition for a writ of certiorari granted October 1, 1984.

Respectfully submitted,

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[1] Ms. Lapinski, et al. (the four individuals who sought to resign their union membership and by so doing precipitated these cases and, who are respondents in No. 84-494 and petitioners in No. 84-528) are not, of course, parties in the *Pattern Makers* case. See Memorandum for Respondent Individual Employees and Motion to Expedite Consideration of Petitions for Certiorari to Consolidate with No. 83-1894 and No. 84-528, p. 3. But they can protect their interests in the way parties to cases behind a lead case normally do—by filing a brief *amicus curiae*.